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# **1 THE RHETORIC AND REALITY OF UNIVESAL HUMAN RIGHTS: AN INTRODUCTION**

The United Nations faces an uphill battle in its bid to secure the universal realisation of human rights. At present, the universal pledges of the United Nations core human rights treaties are not, as yet, a universal reality: millions the world over suffer continuing, often horrific, violations of these purportedly universal entitlements on a daily basis. The universal ideology is challenged in turn by the competing forces of cultural relativism, state sovereignty, reservations and poor compliance. This thesis examines the United Nations universal human rights ideology and the challenges it faces, before ultimately concluding that the promising rhetoric of universalism remains far from being fulfilled: the gap between words and actions remains wide indeed.

Chapter two examines the United Nations rhetoric on the universality of human rights. It demonstrates that international human rights law is based on the premise that individuals are the primary benefactors. Rights proclaimed by the United Nations in the Universal Declaration and subsequent treaties therefore possess a uniquely universal character. They are rights which, by virtue of our common humanity and dignity, must operate to the benefit of every individual regardless of circumstance. In theory, the concept of universal rights is appealing as it confers the same entitlements on all individuals without discrimination. Indeed, it is not only appealing but inescapable: if human rights are to exist, they must apply to the benefit of all individuals in furtherance of the realisation of their inherent dignity. The United Nations has been unrelenting in its insistence on the universality of rights, yet this ideology has by no means been unanimously accepted. On the contrary, the realisation of universal human rights, despite the appealing rhetoric, is fundamentally challenged by various competing forces. Consequently, universal human rights remain but a forlorn aspiration; a utopian ideal which has failed to translate to a practical reality.

The impact of cultural relativism on the realisation of universal rights is discussed in chapter three. Cultural relativism, in contrast to the United Nations insistence on universality, claims that human rights are incapable of cross cultural application. This is

a conflict which has continued to trouble the United Nations, and which shows little sign of abating. However, it would appear that the traditional basis upon which the cultural relativist stance is premised is largely unfounded: upon closer analysis, it seems that the allegation of Western bias is an unfair allegation, especially when one considers the rights contained in the United Nations core human rights treaties. However, the cultural relativist argument has gained a prominent foothold in international human rights discourse, and is relied upon by those arguing for the rejection of the United Nations human rights. The danger with allowing a wholly relative approach to human rights is that, taken to its extreme, it rejects the possibility of any supra national values, and thus may be manipulated as a ruse behind which rights are violated with impunity. Thus, while cultural relativism does not allow the absolute abandonment of universal values, it nevertheless raises some valid concerns, as recognised in chapter three. Certainly, universal human rights must be capable of subjective interpretation, and in addressing this the United Nations could utilise the margin of appreciation doctrine developed by the European Court of Human Rights.

Yet even if the United Nations is successful in demonstrating the cross cultural applicability of human rights, this is only the first challenge to be overcome. On a practical level, state sovereignty seriously impairs the likelihood of achieving truly universal human rights standards, as argued in chapter four of this thesis. State sovereignty is a fundamental principle of international law which dictates that each individual state possesses sole authority to determine the manner in which it treats its citizens. States therefore have supreme authority within their territorial borders. Thus, there is a dichotomy in international human rights law between the state and the individual. Traditional international law is concerned purely with relations between nations: it is inter-national. Individuals, therefore, have absolutely no role to play in international law traditionally. However, international human rights law does not fit this traditional picture as it permeates beyond the national to the individual level: it is not concerned solely with relations between states, but more accurately concerns itself with relations between state and citizen. International human rights law therefore attempts to prescribe the way in which a state must treat its citizens.

Clearly, this is a fundamental conflict, and one which has seriously hampered the success of universal human rights. Although chapter four argues that sovereignty has not impeded the acceptance of universal ideals, a presumption that human rights have therefore irrevocably eroded the importance of sovereignty to states is misguided: in practice, sovereignty remains fiercely guarded and respected by states. Thus, it has proved prohibitive to the international protection of universal rights, demonstrated by tragedies such as those of Darfur and Rwanda. In the face of opposition from sovereign states egregiously abusing their universal human rights pledges, the international community is almost fatally handicapped in the bid to protect human rights for all. While sovereignty reigns supreme in international relations, the likelihood of securing universal human rights looks bleak.

Chapter five then goes on to consider the practice of states with respect to reservations. Often considered to be a necessary pre-requisite of any system of multilateral international law, reservations allow states to submit to the international human right regime on their own terms. They are, however, very damaging to the universality of rights: following the entry of reservations, a treaty can no longer be said to constitute a proclamation of universal rights binding in its entirety upon all state parties. Rather, it is reduced to a series of bilateral agreements, with different states owing different obligations to their citizens. International human rights treaties suffer from extensive reservations, and thus despite promising ratification statistics, it cannot be said with any degree of conviction that human rights have been universally accepted, much less applied.

And finally, chapter six considers the most fatal of all the United Nations challenges to the universal human rights ideology: the chronic levels of non-compliance which characterise international human rights law. Implementation lies in the hands of states: the United Nations supervisory functions are empowered simply to monitor the performance of states, and they therefore rely on the goodwill of national institutions to ensure formal commitment to human rights treaties is realised as a practical reality for individuals. This, unfortunately, is not always forthcoming and consequently the level of compliance with international human rights standards is not reflective of the number of

states formally engaged in the regime. In fact, in a stinging criticism of the state of the world's human rights, Amnesty International's annual report concludes that “injustice, inequality and impunity are...the hallmarks of our world today”.<sup>1</sup> Compliance is not an automatic consequence of ratification: given that ratification is capable of conferring significant reputational benefits upon states, human rights obligations are not simply assumed by those states genuinely committed to their advancement. Thus, compliance is not determined solely by the existence of binding obligations: it is a complex issue motivated by a number of factors which influence a states domestic and international interests.

Ultimately, chapter six argues that compliance with international human rights obligations cannot be determined by the United Nations, and thus the realisation of universal human rights which are truly enjoyed by all peoples without distinction are ultimately outwith its grasp. While the rhetoric of universal human rights is persuasive and appealing, it falls short at the final, and most important, hurdle: transformation to practical reality. The gap between ideology and reality is wide, and while the United Nations has made significant inroads in the field of human rights since its inception, much more remains to be done if citizens of the international community are, one and all, to enjoy the rights and freedoms it has proclaimed.

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<sup>1</sup> Amnesty International. Amnesty International Report 2008: State of the World's Human Rights. Introduction. 2008. Pg. 3. [online] URL: <http://thereport.amnesty.org/document/47>. Accessed 13/12/2008.

## 2 UNIVERSAL HUMAN RIGHTS: THE RHETORIC

Human rights are universal. Or are they? The United Nations, since its creation, has continually asserted that the rights set forth in international law are universal; applicable to all nations and all peoples. One would argue, however, that this idealist notion is far from a reality, despite the growth of the United Nations human rights regime since the Universal Declaration of Human Rights was first drafted in 1948. In order to fully appreciate why the United Nations is failing in its pledge to secure human rights for all, one must fully understand why the United Nations insists on the universality of rights in the first place. Is the notion of universal human rights defensible, or should it be abandoned as an unhelpful illusion in the bid to improve the lives of people the world over?

This thesis will consider the “modern” human rights regime developed by the United Nations. Created in 1945, the United Nations is an organisation borne from the ruins of the Second World War, when the rights of man were flouted with impunity on an unprecedented scale. Rallying in response to the devastation of the war, World leaders created an international organisation determined to prevent the mistakes of the past from recurring again: “to save succeeding generations from the scourge of war”<sup>2</sup> by establishing “international peace and security”.<sup>3</sup> The United Nations was born.

The founding Charter of the United Nations, keen to establish the foundations for world peace, envisaged a key role for human rights in the new organisation. The preamble categorically asserts that members of the United Nations are “determined...to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small”.<sup>4</sup> This is reinforced in Article 1 which outlines the purposes of the United Nations, including achieving international cooperation “in promoting and encouraging respect for human

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<sup>2</sup> Preamble § 1. Charter of the United Nations. Signed at San Francisco on 26 June 1945. Entry into force 24 October 1945, in accordance with Article 110. (hereafter Charter of the United Nations).

<sup>3</sup> *Ibid.* Preamble § 6.

<sup>4</sup> *Ibid.* Preamble § 2.

rights and...fundamental freedom”.<sup>5</sup>

The drafters of the United Nations believed the ultimate objectives of the Organisation could only be successfully pursued if a broad based approach was adopted. Thus, there are three mutually reinforcing foundational pillars which must be addressed: the triangle of security, development and human rights.<sup>6</sup> In order to secure “international peace and security” it is imperative that human rights are respected: “we will not enjoy development without security, we will not enjoy security without development, and we will not enjoy either without respect for human rights. Unless all of these causes are advanced, none will succeed”.<sup>7</sup> Human rights protection has always been, and will always be, inextricably linked to the ultimate goal of the United Nations; human rights “lie at the heart of everything the United Nations aspires to achieve in its global mission of peace and development”.<sup>8</sup>

The United Nations human rights regime was not the first international recognition of the importance of safeguarding human rights, the issue of which was brought to the international plane by its discredited predecessor – the League of Nations – following the first world war. Thus, while the United Nations cannot take sole credit for pioneering the protection of human rights as an issue of international importance, the regime embarked upon was nonetheless revolutionary: it rejected the system of minority rights guarantees favoured by the League of Nations, choosing instead to advocate the universal applicability of rights. That is, an international rights regime which applies equally and without distinction to “all peoples and all nations”.<sup>9</sup> Thus, the Charter of the United Nations asserted the universality of human rights by declaring that the Organisation must promote “universal respect for, and observance of, human rights and

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<sup>5</sup> *Ibid.* Article 1(3).

<sup>6</sup> Slaughter, A-M. Security, Solidarity and Sovereignty: The Grand Themes of UN Reform. *American Journal of International Law*. 2005. Vol. 99, No. 3. Pg. 619 at 619.

<sup>7</sup> Report of the Secretary General. In *Larger Freedom: Towards Development, Security and Human Rights For All*. UN Doc A/59/2005. 21 March 2005. §17.

<sup>8</sup> Annan, K. Foreword, Human Rights: A Compilation of International Instruments. Volume I (First Part) Universal Instruments. UN Doc. ST/HR/1/Rev. 6 (Vol. I/Part 1). Pg. xiii.

<sup>9</sup> Preamble. *Universal Declaration of Human Rights 1948*. Adopted by General Assembly resolution 217 A (III) of 10 December 1948. (hereafter Universal Declaration of Human Rights 1948).

fundamental freedoms for all without distinction as to race, sex, language, or religion”.<sup>10</sup>

The United Nations promptly set about putting its utopian plan into action, and produced the pertinently titled Universal Declaration of Human Rights in 1948. This revolutionary document “profoundly changed the international landscape”,<sup>11</sup> encapsulating and reinforcing the belief in the future of human rights for all. The extension of rights to all individual members of the international community regardless of circumstance is purposefully cemented by the use of the term “universal” in the Declaration’s title, rather than simply “international”. This is not just semantics: the subtle yet significant difference between the two terms is that universal confirms its application to every individual without distinction, which goes beyond a simple international instrument which has been agreed and adopted by representatives of each state.<sup>12</sup>

The Universal Declaration aimed to unite individuals in spite of divergent characteristics and ideologies,<sup>13</sup> and furthers the universality expressed in its title by explicitly confirming the general and worldwide applicability of its provisions by declaring itself “a common standard of achievement for all peoples and all nations”.<sup>14</sup> This all-inclusiveness is further confirmed in its first two articles which enshrine the principles of equality and non-discrimination; provisions which are essential in order to safeguard the universality of human rights.<sup>15</sup>

The Universal Declaration is not, and was never intended to be, a legally binding international treaty, but is simply a resolution of the General Assembly.<sup>16</sup> It does,

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<sup>10</sup> Article 55. Charter of the United Nations.

<sup>11</sup> Morsink, J. *The Universal Declaration of Human Rights: Origins, Drafting and Intent*. University of Pennsylvania Press. Philadelphia. 1999. Quoted in Freeman, M. *Human Rights: An Interdisciplinary Approach*. Polity Press. Cambridge. 2002. Pg. 3.

<sup>12</sup> Espiell, H.G. Universality of Human Rights and Cultural Diversity. *International Social Science Journal*. 1998. Vol. 50, Issue. 158. Pg. 525 at 526.

<sup>13</sup> *Ibid*. Pg. 525 at 526.

<sup>14</sup> Preamble. Universal Declaration of Human Rights 1948.

<sup>15</sup> Brems, E. *Human Rights: Universality and Diversity*. Martinus Nijhoff Publishers. The Hague. 2001. Pg. 4/5.

<sup>16</sup> Mrs Eleanor Roosevelt, Chairman of the Human Rights Commission stated “it (the Declaration) is not and does not purport to be a statement of law or of legal obligation” As quoted by Rehman, J. *International Human Rights Law: A Practical Approach*. Pearson Education Limited. Harlow. 2003. Pg. 57. See also, Renteln,



however, carry strong moral force, setting out the principles by which member states are to be guided. Although legally non-binding, the importance of the Universal Declaration should not be underestimated: it is not “the woolly, verbose and hopelessly utopian document it might easily have been”.<sup>17</sup> A far greater weighting is attributed to the Universal Declaration than any other United Nations Declaration, being constantly referred to and reaffirmed by the international community. It has special prestige, and as such serves as a “source of inspiration”<sup>18</sup> to which all nations can aspire.<sup>19</sup> Indeed, it has even been hailed as a “magna carta for all humanity”.<sup>20</sup> Despite the strong force of the Universal Declaration it was never the intention of the founders of the United Nations that they would stop there. The intention was to create an International Bill of Rights which would include the Universal Declaration and the instruments through which this would find legal force.

Thus, the United Nations proceeded to draft two International Covenants, which elaborated on the rights set forth in the Declaration and afforded them legal force. The creators originally intended to create a single Covenant which would cover all the rights expressed in the Universal Declaration. The Cold War, however, saw a fundamental divide between the United States of America and its allies on the one hand and the USSR and its allies on the other. The ideological divide saw each side place different emphasis on the relative importance of civil and political rights compared to economic social and cultural rights. It was impossible to reach agreement and, for the sake of the progress of the international human rights regime, it was decided that the only way forward would be to formulate two separate covenants.

Nevertheless, when taken together, the Universal Declaration and the two International

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A.D. *International Human Rights: Universalism versus Relativism*. Sage Publications. London. 1990. Pg. 29.

<sup>17</sup> Robertson, D. *A Dictionary of Human Rights*. Europa Publications Limited. London. 1997. 1<sup>st</sup> Edition. Pg. 210.

<sup>18</sup> Preamble. Vienna Declaration and Programme of Action. Adopted by the World Conference on Human Rights in Vienna on 25 June 1993. A/CONF.157/23. (hereafter Vienna Declaration and Programme of Action).

<sup>19</sup> Henkin, L. The United Nations and Human Rights. *International Organization. The United Nations: Accomplishments and Prospects*. 1965. Vol. 19, No. 3. Pg. 504 at 506.

<sup>20</sup> *The Universal Declaration: A Magna Carta for all Humanity*. Office of the United Nations High Commissioner for Human Rights. [online] URL: <http://www.ohchr.org/english/issues/education/training/udhr.htm>. Accessed 08/04/05.

Covenants provide a comprehensive International Bill of Rights, and the United Nations continued to expand its network of multilateral human rights treaties over the years. Today, there are a huge number of international and regional instruments dealing with a vast array of different human rights. This panoply of instruments, which vary in status from the legally binding covenants, conventions and protocols, to the morally guiding declarations, principles and recommendations, cover individual and collective rights ranging from the prohibitions on slavery and genocide to the right to self determination and development to the more particular rights of groups such as women and the disabled.<sup>21</sup> Various complimentary regional instruments have been created in a bid to promote the rights elaborated by the United Nations, from the European Convention on Human Rights in 1950 to the African Charter on Human and Peoples Rights in 1981. These rights lay the foundation for a dignified life informed by free will, through protection from political, social and legal abuse; in essence, human rights, when respected and promoted, allow the human person to flourish and prosper: they “are the foundation of human existence and coexistence”.<sup>22</sup>

Clearly, it would be impossible to consider every human rights instrument within the confines of the present thesis. Thus, the remainder of this study will consider only those rights contained in the nine core international human rights treaties (including the two International Covenants) which have elaborated and expanded upon the rights initially enshrined in the Universal Declaration, covering racial discrimination,<sup>23</sup> civil and political rights,<sup>24</sup> economic social and cultural rights,<sup>25</sup> discrimination against women,<sup>26</sup>

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<sup>21</sup> A comprehensive library of human rights treaties and documents is available from the University of Minnesota Human Rights library. [online] URL: <http://www1.umn.edu/humanrts/instree/ainstls1.htm>. Accessed 28/11/2008. A non-exhaustive list of universal human rights documents is available on the Office of the United Nations High Commissioner for Human Rights website. [online] URL: <http://www2.ohchr.org/english/law/index.htm#instruments>. Accessed 07/12/2008.

<sup>22</sup> Annan, K. Foreword, *Human Rights: A Compilation of International Instruments*. *Op. Cit.* Pg. xiii.

<sup>23</sup> International Convention on the Elimination of All Forms of Racial Discrimination. Adopted and Opened for Signature and Ratification by General Assembly Resolution 2106 (XX) of 21 December 1965. Entry into Force 4 January 1969, in accordance with Article 19. (hereafter International Convention on the Elimination of All Forms of Racial Discrimination).

<sup>24</sup> International Covenant on Civil and Political Rights. Adopted and opened for signature, ratification and accession by General Assembly Resolution 2200A (XXI) of 16 December 1966. Entry into force 23 March 1976, in accordance with Article 49. (hereafter International Covenant on Civil and Political Rights).

<sup>25</sup> International Covenant on Economic, Social and Cultural Rights. Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966. Entry into force 3 January 1976, in accordance with article 27. (hereafter International Covenant on Economic, Social and Cultural Rights).

freedom from torture,<sup>27</sup> children's rights,<sup>28</sup> migrant workers rights,<sup>29</sup> protection from enforced disappearance,<sup>30</sup> and the rights of those with disabilities.<sup>31</sup> This is not to suggest, however, that other human rights instruments are any less important.

The nine core treaties built upon the proclaimed universality of human rights, with repeated reference to the universal promises articulated in the Charter and the Declaration. The two International Covenants, for example, refer in the preamble to the "obligation of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms"<sup>32</sup> while the International Convention on the Elimination of Racial Discrimination reiterates that one of the primary purposes of the United Nations is to promote universal rights without distinction.<sup>33</sup> There is therefore little doubt that the standards of the Universal Declaration and subsequent treaties were, and are, formulated to apply to all individuals regardless of circumstance.

While a proclamation of universal human rights is one thing, the reality may be somewhat different. This thesis therefore aims to examine the relationship between the

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<sup>26</sup> Convention on the Elimination of All Forms of Discrimination against Women. Adopted and Opened for Signature, Ratification and Accession by General Assembly Resolution 34/180 of 18 December 1979. Entry into force 3 September 1981, in accordance with Article 27. (hereafter Convention on the Elimination of All Forms of Discrimination against Women).

<sup>27</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Adopted and opened for signature, ratification and accession by General Assembly Resolution 39/46 of 10 December 1984. Entry into force 26 June 1987, in accordance with article 27. (hereafter Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment).

<sup>28</sup> Convention on the Rights of the Child. Adopted and opened for signature, ratification and accession by General Assembly Resolution 44/25 of 20 November 1989. Entry into force 2 September 1990, in accordance with Article 49. (hereafter Convention on the Rights of the Child).

<sup>29</sup> International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families. Adopted and opened for signature, ratification and accession by General Assembly resolution 45/158 of 18 December 1990. Entry into force 1 July 2003, in accordance with Article 87. (hereafter International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families).

<sup>30</sup> International Convention for the Protection of All Persons from Enforced Disappearance (not yet in force). Adopted and opened for signature and ratification by General Assembly Resolution 61/177 of 20 December 2006. (hereafter International Convention for the Protection of All Persons from Enforced Disappearance).

<sup>31</sup> Convention on the Rights of Persons with Disabilities. Adopted and opened for signature and ratification by General Assembly Resolution 61/106 of 13 December 2006. Entry into force 3 May 2008 in accordance with Article 45. (hereafter Convention on the Rights of Persons with Disabilities).

<sup>32</sup> Preamble § 4. International Covenant on Economic, Social and Cultural Rights; and Preamble § 4. International Covenant on Civil and Political Rights.

<sup>33</sup> International Convention on the Elimination of All Forms of Racial Discrimination.

rhetoric of universality and the practical reality. But first, what do we mean when we speak of “universal rights”? And why is universality so important?

## 2.1 Defining Universalism: The Ideology

The position of the United Nations is clear: human rights are universal. But what exactly does this mean? According to the Oxford Dictionary, universal means “of or belonging to...all persons or things in the world or in the class concerned, applicable to all cases”.<sup>34</sup> To speak of “universal human rights” is therefore to speak of rights of all persons in the world. They are the rights one has simply by being human. Human rights are therefore a product of our humanity, and are what make us human<sup>35</sup>: they are intrinsic to all persons,<sup>36</sup> not privileges which Governments extend to their people.<sup>37</sup> This philosophy therefore necessarily implies that the rights tabulated in the various treaties must be universal: they are our birthright as they “arise from no special undertaking beyond membership in the human race. To have human rights, one does not have to do anything other than be born a human being”.<sup>38</sup> This is referred to in Article 1 of the Universal Declaration which states that “[A]ll human beings... are endowed with reason and conscience and should act towards one another in a spirit of brotherhood”.<sup>39</sup> Human rights are therefore linked to the qualities of conscience and reason which inform humanity: they are innate, pre-social characteristics that define humanity.<sup>40</sup>

Advocates of universal human rights therefore essentially contend that certain rights inhere in all individuals regardless of particular manifestations such as culture, race or

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<sup>34</sup> Allen, R.E (ed). *The Concise Oxford Dictionary of Current English*. Oxford University Press. Oxford. 8th Edition. 1991. Pg. 1339.

<sup>35</sup> Booth, K. *Three Tyrannies*. 1999. In O’Byrne, D.J. *Human Rights: An Introduction*. Pearson Education Limited. Harlow. 2003. Pg. 41.

<sup>36</sup> Schachter, O. Human Dignity as a Normative Concept. *American Journal of International Law*. 1983. Vol. 77. Pg. 848 at 853.

<sup>37</sup> Donnelly, J. Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights. *The American Political Science Review*. 1982. Vol.76. Part 2. Pg. 303 at 304/5.

<sup>38</sup> *Ibid*. Pg. 303 at 305/306.

<sup>39</sup> *Universal Declaration of Human Rights 1948*.

<sup>40</sup> O’Byrne, D.J. *Human Rights: An Introduction*. *Op. Cit.* Pg. 41

sex: universalism is concerned with the individual, not the context.<sup>41</sup> According to the American Convention on Human Rights, one must recognise “the essential rights of man are not derived from one's being a national of a certain state, but are based on the attributes of the human person”.<sup>42</sup> This contention is logical: if human rights were anything other than applicable to all, they would be merely context specific rights; rights which a person may achieve by virtue of residence in a particular territory, or by allegiance to a certain group, but not human rights. To avoid this accusation, we must view human rights as rights that every human being is entitled to on account of his place in the global community.<sup>43</sup> The essential feature of human rights is that they are universal.<sup>44</sup>

Clearly, the universalist assertion is that if human rights are to exist at all, then they must apply equally to all human beings without exceptions as to where they are or in which cultural tradition they have been brought up. Advocates of universalism therefore recognise human rights as “worldwide, overarching values to be respected in their own right”:<sup>45</sup> they are not contingent upon the fulfillment of any other criteria. Universal human rights theorists are therefore unwilling to allow the notion of human rights to “compete for our allegiance on equal terms with other theories”.<sup>46</sup> The permissibility of any alternative theory should be determined according to conformity with universal human rights: conformity indicates permissibility, while conflict indicates impermissibility.<sup>47</sup> As a result state parties must promote universal respect for human

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<sup>41</sup> Universalism is grounded in liberal political philosophy, which favours individual liberty, and presupposes the individual as the basic social unit. See Pollis, A. A New Universalism. Pg. 9 at 10. In Pollis, A and Schwab, P (ed). *Human Rights; New Perspectives, New Realities*. Lynne Rienner Publishers. 2000.

<sup>42</sup> American Convention on Human Rights. Adopted at San Jose, Costa Rica on 22 November 1969. Entry into force 18 July 1978 in accordance with Article 74(2). 1144 United Nations Treaty Service 123 (hereafter American Convention on Human Rights).

<sup>43</sup> An-Na'im, Prof. A. Against Mounting Odds: Is the Universality of Human Rights Coherent or Viable Without International Legality? *Keynote Speech at Nottingham University Human Rights Conference: Whose Culture? Whose Rights? Exploring the Universality of Human Rights Law*. 12 March 2005.

<sup>44</sup> v Dijk, P. A Common Standard of Achievement. About Universal Validity and Uniform Interpretation of International Human Rights Norms. *Netherlands Quarterly of Human Rights*. 1995. Vol. 13, No. 2. Pg. 105 at 108.

<sup>45</sup> Etzioni, A [1997(b)]. The End of Cross-Cultural Relativism. *Alternatives, social Transformation and Humane Governance*. Vol. 22, No. 2. 1997. [online] URL: <http://www.gwu.edu/~ccps/etzioni/A253.html>. Accessed 14/12/03

<sup>46</sup> Jones, P. Human Rights and Diverse Cultures: Continuity of Discontinuity? Pg. 27. In Caney, S and Jones, P (ed). *Human Rights and Global Diversity*. Frank Cass Publishers. 2001.

<sup>47</sup> *Ibid*. Pg. 27.

rights; not selective, not relative but universal respect, observance and protection of the rights laid down in international law.<sup>48</sup> Human rights are like “trump” cards which override any other competing considerations.<sup>49</sup> Thus the Universal Declaration of Human Rights was the first time human rights were “recognized as belonging inherently to all people, rather than being gifts magnanimously bestowed upon them, or denied to them, by design, fate or the whims of ruling regimes”.<sup>50</sup>

When one considers the United Nations human rights system it is clear that it has been designed as a universalist doctrine, as it ascribes a single set of core values to all of humanity.<sup>51</sup> But we cannot accept the universality of human rights without further examination. Simple assertions of universality are insufficient without anything to substantiate them. Thus, it is vital to examine why the United Nations so fervently champions universal human rights: why is universality so important to international human rights? Once the justification for universality has been established, the most pressing issue this thesis attempts to uncover is whether human rights are, in fact, universal: in other words, is talk of “universal human rights” merely empty rhetoric or is it a true reflection of global consensus? The remainder of this chapter therefore examines the basis of the United Nations insistence on universal human rights, before we turn our attention to the problems encountered by universality in practice.

## **2.2 Human Dignity: The Ideological Basis of Universal Human Rights**

As the United Nations has so unequivocally asserted the universality of human rights over the years, the connection between the two has become almost “self evident”<sup>52</sup> in the minds of those who encounter it. However, if the United Nations believed, even hoped, the proclamation that rights are universal, and must be applied without

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<sup>48</sup> Ayton-Shenker, D. The Challenge of Human Rights and Cultural Diversity. *United Nations Background Note*. [online] URL: <http://www.cpahq.org/uploadstore/docs/16.pdf>. Accessed 23/01/2004.

<sup>49</sup> Dworkin, R. *Taking Rights Seriously*. The Bath Press. Avon. 1991. 6th Edition. As referred to in Donnelly, J [1982]. *Op. Cit.* Pg. 303 at 305.

<sup>50</sup> Pillay, N. The Universal Declaration of Human Rights turns 60. Office of the United Nations High Commissioner for Human Rights. December 2008. [online] URL: <http://www.ohchr.org/EN/NewsEvents/Pages/UDHRTurns60.aspx>. Accessed 15/12/2008.

<sup>51</sup> Jones, P. *Op. Cit.* Pg. 27.

<sup>52</sup> Brems, E. *Op. Cit.* Pg. 20.

distinction, would be sufficient to establish the uncontested authority of the statement it would be a misguided and arrogant assumption. There must be some justifiable grounding to support it. This is provided by reference to the concept of human dignity.

The founding states of the United Nations drew heavily on the notion of human dignity as the foundational basis for a system of all inclusive rights of worldwide applicability. In the post war era, members believed that a notion such as human dignity could provide a vision to unite nations in the search for a common goal.<sup>53</sup> Perhaps inevitably, they did not go on to define what was meant by human dignity and failed to elaborate on its content. While the failure to determine the meaning of human dignity was perhaps inevitable, it does mean that we are left with little guidance when evaluating the merits of the universal human rights regime it preceded. Thus, “despite its prominent status in international law...it [human dignity] does not have a concrete meaning or a consistent way of being defined”.<sup>54</sup> The United Nations appears oblivious of the need for any elaboration of the term: it seems that human rights should be taken as an automatic pre-requisite for the realisation of human dignity, and further, that human dignity is a universal idea which is cross culturally valid. Human dignity has been treated as a concept which requires no objective explanation or justification, and has come to be treated as a “self explanatory justification”<sup>55</sup> for human rights protection. The problem is that without elaboration, “protecting human dignity” gives little guidance as to what is required of states in terms of human rights.

So what do we mean when we speak of “human dignity”? According to the dictionary definition, dignity is simply “the state of being worthy of honour or respect”.<sup>56</sup> One would argue that this is determined by a combination of both an individual’s own sense of self worth, and the attitudes of others towards that individual.<sup>57</sup> Immanuel Kant’s ethical imperative is particularly important when attempting to define dignity. Kant argued that although everybody has different goals and desires, they are, one and all,

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<sup>53</sup> Lee, M.Y.K. Universal Human Dignity: Some Reflections in the Asian Context. *Asian Journal of Comparative Law*. 2008. Vol. 3, No. 1. Pg. 1 at 3.

<sup>54</sup> *Ibid.* Pg. 1 at 1.

<sup>55</sup> *Ibid.* Pg. 1 at 4.

<sup>56</sup> Allen, R.E (ed). *The Concise Oxford Dictionary of Current English*. Op. Cit. Pg. 326.

<sup>57</sup> Feldman, D. Dignity as a Legal Value: Part I. *Public Law*. 1999. Pg. 682 at 685/6.

capable of autonomous will, and an individual should therefore be free to choose for himself his ends and purposes. Human beings should not be treated or manipulated as mere objects of the state, but should be treated as individuals.<sup>58</sup> Thus, in line with the endowment of reason and the necessity of self autonomy according to Kant's ethical imperative, the ability to form one's own opinions and abide by one's own beliefs is central to respect for dignity.<sup>59</sup>

Thus, if human dignity is taken to be the reason for human rights, it necessarily means that rights must be universal. Human dignity attaches to every individual by virtue of their membership of the human species. The Universal Declaration explicitly recognises this, premising the entire Declaration on the "recognition of the inherent dignity...of all members of the human family".<sup>60</sup> It is therefore a characteristic which is innate to the human species and is consequently a transcendent notion: it is not context specific and does not vary according to personal characteristics or circumstances. As Pollis argues, it is universal in spite of diversity throughout the world with regard to cultural forms, values and beliefs.<sup>61</sup> Humanity is therefore the underlying and only requirement which informs dignity, and consequently necessitates the protection of universally applicable human rights for "all peoples".<sup>62</sup> Necessarily, transcendent human rights derived from dignity cannot be subject to arbitrary distinctions based on "race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status":<sup>63</sup> they are universal.

The reciprocal relationship between respect for human rights and fulfillment of dignity was painfully apparent in the aftermath of the war. Having observed the recurrent flouting of rights, the international community was convinced that violation of basic human rights severely impinged upon an individual's dignity.<sup>64</sup> Protection of the

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<sup>58</sup> Chen, L.-C. *An Introduction to Contemporary International Law: A Policy Oriented Perspective*. Yale University Press. New York. 2000. 2<sup>nd</sup> Edition. Pg. 198.

<sup>59</sup> Schachter, O. Human Dignity as a Normative Concept. *Op. Cit.* Pg. 848 at 850.

<sup>60</sup> Preamble § 1. Universal Declaration of Human Rights 1948.

<sup>61</sup> Pollis, A. Towards a New Universalism: Reconstruction and Dialogue. *Netherlands Quarterly of Human Rights*. 1998. Vol. 16, No. 1. Pg. 5 at 9.

<sup>62</sup> Preamble § 8. Universal Declaration of Human Rights 1948.

<sup>63</sup> Article 2. Universal Declaration of Human Rights 1948.

<sup>64</sup> McCrudden, C. Human Dignity. *University of Oxford Faculty of Law Legal Studies Research Paper Series*.



inherent dignity of the human person consequently offered a compelling justification for universality of rights. As Donnelly argues, human rights are not necessarily needed for life, but are certainly needed for a life of dignity: we have a human right to those things needed for a life worthy of an autonomous human being endowed with reason and conscience.<sup>65</sup> Human rights therefore exist as a means of enabling people to live in dignity, and must therefore be universally protected and promoted in order to improve the possibility of everyone realising a dignified life.

The connection between human rights and human dignity is now ubiquitous, demonstrated by its omnipresent recital in various international instruments.<sup>66</sup> The sentiments of the United Nations Charter and Universal Declaration are echoed in all of the nine core treaties which endorse the association between rights and dignity. Indeed, many go much further and categorically state that human rights “derive from the inherent dignity of the human person”.<sup>67</sup> Human rights are today synonymous with human dignity, and the United Nations clearly still holds the principle as core to its objectives. The “Dignity and Justice for all of Us” campaign launched by Secretary General Ban Ki Moon on Human Rights Day 2007, and his comments that “the Declaration was the first global statement of what we now take for granted – the inherent dignity and equality of all human beings”,<sup>68</sup> cement the important relationship between rights and dignity, which is key to the United Nations. At this juncture, the fundamental universality of human rights is the only sensible conclusion one can draw: in fact, to claim otherwise would be to deny the elementary equality of the human species. If one person is entitled, then surely so must be all.

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Working Paper No 10/2006. Pg. 4. [online] <http://papers.ssrn.com/Abstract=899687>. Accessed 12/10/2006.

<sup>65</sup> Donnelly, J. *Universal Human Rights in Theory and Practice*. Cornell University Press. New York. 2003. 2<sup>nd</sup> Edition. Pg. 14.

<sup>66</sup> Witte, J. Rights in the Western Tradition. *Public Law and Legal Theory Research Paper Series*. Research Paper No. 05-21. [online] URL: <http://ssrn.com/abstract=753484>. Accessed 20/07/2007.

<sup>67</sup> Both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights declare in the Preamble that “these rights derive from the inherent dignity of the human person”. This principle is reiterated in the Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Convention on the Rights of the Child; and Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocol No. 11. Opened for signature 4/11/1950. Entry into force 3/9/1953, in accordance with Article 59. (hereafter European Convention of Human Rights).

<sup>68</sup> Ki-moon, B. Secretary-General Ban Ki moon message on Human Rights Day, 10 December 2007. [online] <http://www.ohchr.org/EN/UDHR/Pages/60UDHRSGStatement.aspx>. Accessed 30/09/2008.

One must of course note that human dignity is often argued a Western concept rooted in liberalism, with limited applicability cross culturally. Yet this thesis prefers to argue that, far from being an incoherent abstract conception as it is oftentimes portrayed, it does in fact have a strong overarching element which is universally valid, which therefore supports the theory of universal human rights. Cultural relativists, as we shall see, argue that human dignity cannot serve as a sound justification for universal human rights, but this cannot be fully supported. Certainly, Feldman and McCrudden are correct when they say that there is no uniform interpretation of dignity. But this does not mean that the concept is not universal. Just because dignity means different things to different people, this does not diminish its importance as a foundation for human rights protection: everyone desires to achieve their particular conception of dignity and human rights enable individuals to achieve this.

The cross cultural relevance of human dignity becomes clear when one considers that the Universal Declaration, with its emphasis on human dignity, has “inspired the constitutions of many newly independent States and many new democracies. It has become a yardstick by which we measure respect for what we know, or should know, as right and wrong”.<sup>69</sup> Regionally, it is a prominent feature of both the Charter of the Organization of African Unity<sup>70</sup> and the African Charter on Human and Peoples Rights<sup>71</sup>; the Arab Charter on Human Rights places strong emphasis on the dignity of its peoples<sup>72</sup>; the American Convention on Human Rights repeatedly refers to the dignity of man in its provisions, recognising the importance of rights to the safeguarding of dignity<sup>73</sup>; and while it was omitted from the European Convention on Human Rights and Fundamental Freedoms, it is repeatedly referenced in the Charter of the Fundamental Rights of the European Union, which refers to the “universal value[,] of

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<sup>69</sup> *Ibid.*

<sup>70</sup> Preamble. Charter of the Organization of African Unity 1963. 479 United Nations Treaty Service 39. Entry into force 13 September 1963.

<sup>71</sup> Article 5. African [Banjul] Charter on Human and People's Rights. O.A.U. Doc.CAB/LEG/67/3 Rev.5.1981.

<sup>72</sup> Articles 2, 3, 17, 20, 33, 40. Arab Charter on Human Rights. League of Arab States. 22 May 2004, reprinted in 12 international Human Rights Reports 893(2005). Entry into force 15 March 2008.

<sup>73</sup> Article 5(2), Article 6(2) and Article 11(1). American Convention on Human Rights.

human dignity”<sup>74</sup> and devotes its first Article to the need to protect and respect the “inviolable”<sup>75</sup> dignity of man. Nationally, human dignity has gained prominence as a feature of many recently revised or adopted constitutions, particularly for those nations that have suffered longstanding and widespread human rights violations in their recent history.<sup>76</sup> Immediately following the Second World War, Germany's newly drafted Constitution earmarked human dignity as its cornerstone, requiring all state authority to actively “respect and protect” it.<sup>77</sup> South Africa also relied heavily on human dignity as one of its founding values when drawing up its constitution following the formal abolition of the policy of apartheid in the earlier part of the 1990’s.<sup>78</sup> The system of apartheid was one of the most appalling continuing human rights violation of recent times: that human dignity features so significantly in the South African constitution is evidence of the fundamental link between respect for human rights and protection of dignity. Irrespective of geographical or political situation, human rights and human dignity are irrefutably connected, which is reinforced by such explicit recognition by diverse nations.

## 2.3 Universal Ratification: The Practical Basis of Universal Human Rights

So how, exactly, is the United Nations to ensure rights are respected, protected and promoted by states such that they are fully enjoyed by individuals the world over? The necessary first step is ensuring states embrace the rights proclaimed through ratification. Words alone, while they may inspire hope for the future, are nothing more than meaningless rhetoric if they are not supported by the participation of all members in legally binding treaties. This idea essentially marries the competing philosophies of positive and natural law by acknowledging that, while there are certain universal rights, a positive law system which meets these values is indispensable to its effective functioning: that is, universal rights will count for very little if they are not positively

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<sup>74</sup> Preamble § 2. Charter of the Fundamental Rights of the European Union. 2000/C 364/01. Official Journal of the European Communities. 18 Dec 2000.

<sup>75</sup> *Ibid.* Article 1.

<sup>76</sup> Lee, M.Y.K. Universal Human Dignity: Some Reflections in the Asian Context. *Op. Cit.* Pg. 1 at 3.

<sup>77</sup> Article 1(1). Basic Law for the Federal Republic of Germany. Promulgated on 23 May 1949 (first issue of the *Federal Law Gazette*, dated 23 May 1949), as amended up to and including 20 December 1993.

<sup>78</sup> Article 1(a), Constitution of the Republic of South Africa 1996 (approved on 4 December 1996, in force 4 February 1997).

formulated by the international community in the form of binding treaties subject to effective supervision and enforcement by appropriate international organs.<sup>79</sup>

Moreover, mere theories alone are not enough to ensure states “promote democracy and strengthen the rule of law, as well as respect for all internationally recognized human rights and fundamental freedoms...” as resolved by the General Assembly in the Millennium Declaration in 2000.<sup>80</sup> For any system of international human rights protection to work effectively it is reliant on its members embracing their obligations through active participation in the relevant instruments,<sup>81</sup> for if a state does not participate the international bodies are powerless to hold it to account to these supposedly universal norms. Universal ratification is the necessary first step on the very long and arduous path towards translating the normative universality of human rights asserted above into legal reality.<sup>82</sup>

In light of the firm belief in the universality of the rights, universal ratification is a goal of “utmost importance”<sup>83</sup> to the United Nations. As a result an on-going dialogue has emerged, with members frequently re-iterating the importance of succeeding in the goal of universal participation, arguing that “it is vital that the international community reinforces its efforts towards the ratification of international human rights instruments”.<sup>84</sup> The United Nations has always believed that universal ratification would significantly reinforce the universality of human rights,<sup>85</sup> and would “provide the most stable and effective foundation for ensuring respect for and observance of human rights

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<sup>79</sup> Shestack, J.J. *The Philosophical Foundations of Human Rights*. In Symonides, J (ed). *Human Rights: Concepts and Standards*. 2000. UNESCO Publishing. Aldershot. Pg. 43.

<sup>80</sup> General Assembly Resolution 55/2. *United Nations Millennium Declaration*. UN Doc. A/RES/55/2. 8 September 2000. § 24. (hereafter United Nations Millennium Declaration).

<sup>81</sup> Smith, R.K.M [2007]. *Text and Materials on International Human Rights*. Routledge-Cavendish. Oxon. 2007. Pg. 61.

<sup>82</sup> Brems, E. *Op. Cit.* Pg. 5.

<sup>83</sup> Alston, P. Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments. *Interim Report on Enhancing the Long-term Effectiveness of the United Nations Human Rights Treaty System*. UN Doc. A/CONF.157/PC/62/Add.11/Rev.1. 22 April 1993. § 75.

<sup>84</sup> Report of the United Nations High Commissioner for Human Rights. *Comprehensive Implementation of and Follow-up to the Vienna Declaration and Programme of Action*. UN Doc. A/53/372. 11 September 1998. § 17.

<sup>85</sup> Alston, P. Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments. *Interim Report on Enhancing the Long-term Effectiveness of the United Nations Human Rights Treaty System*. *Op. Cit.* § 82.

in all countries”.<sup>86</sup> In theory at least, it proves there is international acceptance of the norms enunciated, with consensus among vastly differing state parties that there is a core set of shared rights which must be respected and promoted. Ratification is essential as only once an instrument has been ratified will it become legally binding upon individual states, which should theoretically enable the United Nations organs to monitor state compliance in a bid to ensure states respect their human rights obligations. By ratifying human rights treaties, states assume legal liability for their provisions and the doctrine of *pacta sunt servanda* requires member states to observe the treaty and discharge their obligations in good faith.<sup>87</sup> While this is certainly true in theory, in practice the mere fact that a state has assumed legally binding obligations is not in itself sufficient to ensure compliance. Of course it is a necessary first step, but compliance, as discussed in chapter six, is a far more complex issue which does not automatically flow directly from a states ratification of a treaty.

In light of the international community’s recognition of the universality of human rights, the Vienna Declaration and Programme of Action also urged the universal ratification of all human rights treaties.<sup>88</sup> Member states appeared to take this on board, with figures demonstrating that states continued to commit themselves to the binding obligations of various international human rights treaties which, without exception, honour the influence of the Universal Declaration and repeat its assertions that human rights are universal and must be protected without distinction. However, the Convention on the Rights of the Child is, to date, the only core human rights treaty to have secured virtual universal ratification: only two states are yet to adopt its provisions.<sup>89</sup> After opening for signature in January 1990, it was accepted by states with unprecedented rapidity: within ten years, by the time of the Millennium Summit in 2000, the Convention on the Rights of the Child had achieved unrivalled success. The Convention is one of the most extensive international instruments in terms of the rights

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<sup>86</sup> Report of the United Nations High Commissioner for Human Rights. *Comprehensive Implementation of and Follow-up to the Vienna Declaration and Programme of Action*. Op. Cit. § 11.

<sup>87</sup> Article 26. Vienna Convention on the Law of Treaties 1969. Done at Vienna on 23 May 1969. Entry into force 27 January 1980, in accordance with Article 84. (hereafter Vienna Convention on the Law of Treaties 1969).

<sup>88</sup> Part I § 26. Vienna Declaration and Programme of Action.

<sup>89</sup> Somalia and the United States of America are the only states not to have ratified the Convention.

it proclaims, covering a broad spectrum of rights. These range from: civil and political freedoms<sup>90</sup>; to protection from economic and sexual exploitation<sup>91</sup>; to the right to health and education<sup>92</sup>; and the prohibition against any form of discrimination.<sup>93</sup> The experience of this Convention is therefore said to serve as a “beacon of hope”<sup>94</sup> at the forefront of the debate on the universality of rights and the potential for universal ratification; apparent evidence that there is no longer deep rooted resentment towards participating in the international human rights treaty regime.<sup>95</sup>

The success of the Children’s Convention is particularly interesting. After all, the rights proclaimed by the treaty are often a verbatim replication of those directed at adults in other international treaties such as the two International Covenants, for example. Indeed in many cases they are even more comprehensive. Why, if a state is willing to obligate itself to protect the rights of minors, does it refuse to accept those treaty provisions which seek to protect the child’s adult counterparts: is a child entitled to these rights but an adult is not? Surely not: while children are a distinctly vulnerable group requiring extra special protection, this does not mean that adults require any less protection from torture, for example. Certainly, it is “odd”<sup>96</sup> that all but two state parties feel comfortable obligating themselves to the extensive provisions of the Convention on the Rights of the Child, but will not accept equivalent obligations in other international treaties. Fiji, for example, has ratified the Convention on the Rights of the Child, but neither of the International Covenants, nor the Convention against Torture.<sup>97</sup>

Philip Alston, the United Nations independent expert on enhancing the effectiveness of the human rights treaties, identified the year 2000 as the immortal date by which the

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<sup>90</sup> For example Article 13 freedom of expression; Article 14 freedom of thought, conscience and religion; and Article 15 freedom of association. Convention on the Rights of the Child.

<sup>91</sup> Articles 32 and 34. Convention on the Rights of the Child.

<sup>92</sup> Articles 24 and 28. Convention on the Rights of the Child.

<sup>93</sup> Articles 2. Convention on the Rights of the Child.

<sup>94</sup> Smith, R.K.M [2007]. *Op. Cit.* Pg. 65.

<sup>95</sup> Alston, P. Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments. *Final Report on Enhancing the Long Term Effectiveness of the United Nations Human Rights Treaty System*. UN Doc. E/CN.4/1997/74. 27 March 1997. § 21.

<sup>96</sup> *Ibid.* § 21.

<sup>97</sup> Chapter IV.11 Status of Multilateral Treaties Deposited with the Secretary General. United Nations Treaty Collection. [online] URL: <http://treaties.un.org/Pages/Treaties.aspx?id=4&subid=A&lang=en>. Accessed 22/12/2008.

United Nations should seek to ensure that all member states were participating absolutely in the treaty system, following his comprehensive examination of the current treaty regime.<sup>98</sup> However, we have sailed past that landmark by almost a decade and the goal of universal ratification still remains some way off, with a significant lacuna in participation despite an overall increase in state parties.

Thus one must ask: why has the Children's Convention come so close to securing the elusive prize of universal membership when no other treaty has? Are there any lessons to be learned from the experience of this Convention which could further the universality of human rights norms? Primarily, in order to promote treaty provisions and facilitate their uptake, political will and domestic pressure must be mobilised: the issues must be brought to the fore of the international arena, and the importance of protecting these rights must be brought to bear on national governments through active awareness campaigns, both internationally and locally.<sup>99</sup> When rights are brought under the spotlight, it becomes more difficult for Governments to blithely shrug them aside. The will of Governments must therefore be engaged. If human rights can be easily cast aside, their universality will be weakened as Governments continue to ignore their responsibilities to respect and protect without consequence. The fact is that the Children's Convention remains the only treaty to have secured universal membership. If the other core treaties fail to attract universal participation, can rights ever be considered truly universal?

Optimistically, one would argue that participation by each and every state in each and every treaty is not necessarily prerequisite to the universality of rights. After all, as was mentioned above, rights are indivisible: provisions cut across multiple treaties, and thereby create a mesh of rights which ensnare participating states. Vietnam, for example, has failed to ratify the Convention against Torture but is nevertheless bound to prohibit all forms of torture, cruel, inhuman and degrading treatment pursuant to its

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<sup>98</sup> Alston, P. Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments. *Interim Report on Enhancing the Long-term Effectiveness of the United Nations Human Rights Treaty System*. *Op. Cit.* § 89.

<sup>99</sup> Alston, P. Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments. *Final Report on Enhancing the Long Term Effectiveness of the United Nations Human Rights Treaty System*. *Op. Cit.* § 19-20.

promises under Article 5 of the International Covenant on Civil and Political Rights. Moreover, many rights are repeated verbatim from treaty to treaty, which helps to further the universality of rights. The prohibition of discrimination, for example, features in all but the Convention on Enforced Disappearance, and thus a member which is party to only one treaty would nevertheless be bound by its requirements. Consequently, states become entangled in a web of rights which builds up around them: with each ratification, the web tightens ever further.

This is significant when we consider that today no member state has failed to ratify a single human rights treaty. Indeed, not only is every member state party to at least one treaty; more than eighty percent of states are party to four or more<sup>100</sup> and six of the principal human rights treaties have secured the participation of three quarters of the world's states.<sup>101</sup> Such statistics would therefore lead one to assume that all member states are entwined in a mesh of interrelated and interdependent human rights, rendering any lacuna in participation less detrimental to the overall universality of rights than may at first be feared. The reality, however, is that the battle to secure human rights protection does not end with ratification. Yes, states may find themselves enveloped in a web of legal obligations, but does this mean anything in practice?

Unfortunately, it is evident that, as yet, human rights remain far from a universal reality. While the arguments presented above seem to offer a strong defence of the necessary universality of human rights, demonstrating the solid theoretical and practical justifications underlying such a principle, this is only one side of the story. In reality, peoples human rights continue to be abused on a daily basis and we remain some way short of fulfilling the pledges of the Universal Declaration, despite sixty years of trying. So why do human rights remain little more than a myth for so many? As will be argued in the coming chapters of this thesis, the gap between rhetoric and reality has been caused by a number of important factors which influence human rights law: namely

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<sup>100</sup> Bayefsky, A.F. *The UN Human Rights Treaty System: Universality at the Crossroads*. 2001. [online] URL: <http://www.bayefsky.com/report/finalreport.pdf>. Accessed 01/08/2007. Pg. 2-4.

<sup>101</sup> Chapter IV. Multilateral Treaties Deposited with the Secretary General. Only the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Adopted by General Assembly resolution 45/158 of 18 December 1990, has failed to achieve this with a total of 36 state parties as at 27 April 2007.



state sovereignty, cultural relativism, reservations and poor compliance.

Since its very beginnings, the United Nations human rights regime has been dogged by the conflict between universal, overarching norms on the one hand, and both state sovereignty and cultural relativism on the other. These challenge the very ideology of universal rights, and far from abating with the passage of time, have only grown more vociferous. While the widespread ratification of treaties may be invoked in defence of the practical universality of their provisions, this is a superficial argument which fails to take into account some very damaging contradictory evidence. Reservations and poor compliance, in particular, undermine ratification and ensure that universal human rights remain an elusive concept rather than a practical reality. At present, as we shall see, the sixty year old visionary pledges of the Universal Declaration often remain little more than broken paper promises.

### 3 CULTURAL RELATIVISM AND UNIVERSAL HUMAN RIGHTS: AN IDEOLOGICAL DIVIDE

So to the first challenge facing universal human rights: cultural relativism. As we shall see in the examination which follows, cultural relativism questions the very essence of universal human rights: it is an ideology in complete opposition to transnational, universal norms. The ideological arguments for universality have most certainly not been accepted unanimously, which ultimately contributes to the gap between rhetoric and reality in international human rights law. One of the most persistent challenges to universality comes from cultural relativism, which has continued to blight the United Nations since the inception of its human rights regime. The relativist proposition attempts to undermine the theoretical justification for universal human rights, alleging that there can be no universal rights. Rather, according to relativists, rights are informed by cultural specificity. Clearly such a stance delivers a severe blow to the likelihood of securing universal respect for international human rights treaties: it provides states with a reason – or perhaps more fittingly an excuse – for rejecting or criticising the United Nations human rights norms. If universal human rights are to stand any chance of success, it is imperative that the issues raised by cultural relativists are satisfactorily addressed by the United Nations.

So what exactly do we mean when we speak of “cultural relativism”? In essence, cultural relativism contrasts sharply with the universalist ideology, asserting instead that human rights norms actually have little cross-cultural validity and thus there can be no definitive list of what constitutes appropriate practice in one culture compared to another.<sup>102</sup> While the United Nations holds its human rights programme as “a common standard of achievement for all peoples and all nations”<sup>103</sup> – that is, universal – cultural relativists argue that there are no absolute standards by which every nation can be bound. They contend that universalism implies all people and all cultures behave and think in a

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<sup>102</sup> Steiner, Prof. H.J. Cultural Relativism and the Attitude of Certain Asian Countries Towards the Universality of Human Rights. *Constitutions, Rights and Democracy: Past, Present and Future*. 1995. Pg. 17 at 18. [online] <http://www.aph.gov.au/Senate/pubs/pops/pop25/c02.pdf>. Accessed 23/01/2004.

<sup>103</sup> Preamble § 8. Universal Declaration of Human Rights 1948.

similar fashion, but argue this is not the case in practice.<sup>104</sup> Rather, human rights differ from one culture to another, and the “right and wrong” principles of human rights are only legitimate for the culture these values originate in.<sup>105</sup> Thus, it must be accepted that “what is right or good for one individual or society is not right or good for another”<sup>106</sup>; rights have different implications depending on the specific orientations of each state, and it is therefore impossible to prescribe a definitive list of universally applicable rights and obligations which are transculturally binding.<sup>107</sup>

The outcome of cultural relativism is that local cultural tradition properly determines the existence and scope of all rights and freedoms enjoyed by the individuals of that society.<sup>108</sup> Jones argues that human rights as developed by the United Nations essentially sit in judgement over what doctrines or beliefs should be considered right or wrong.<sup>109</sup> This, he argues, is unacceptable as each person should be entitled to live according to his or her own beliefs, rather than some extraneous proclamation of universal values. Thus it is quite simple: relativists vehemently deny that all rights are universally applicable. The implications of this stance are potentially catastrophic to the realisation of universal human rights: if the argument that rights are informed by culture is accurate and defensible, the United Nations campaign of universalism is surely doomed to fail.

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<sup>104</sup> Renteln, A.D. as quoted by Skinner, M. Locating Indigenous Power. *New England International and Comparative Law Annual*. 2001. Vol. 7. Pg. 69 at 79.

<sup>105</sup> Renteln, A.D. *International Human Rights: Universalism versus Relativism*. *Op. Cit.* Pg. 72. See also, Donoho, D.L [1991]. Relativism Versus Universalism in Human Rights: The Search for Meaningful Standards. *Stanford Journal of International Law*. 1991. Vol. 57. Pg. 345 at 352.

<sup>106</sup> Frankena, W. *Ethics*. 1973. Pg. 109. Quoted by Renteln, A.D. *International Human Rights: Universalism versus Relativism*. *Op. Cit.* Pg. 29.

<sup>107</sup> Donoho, D.L. Autonomy, Self Governance and the Margin of Appreciation: Developing a Jurisprudence of Diversity Within Universal Human Rights. *Emory International Law Review*. 2001. Vol. 15. Pg. 391 at 392.

<sup>108</sup> Teson argues that culture can determine the scope of civil and political rights. However, following the Vienna Declaration which proclaimed that “all human rights are universal, indivisible and interdependent and interrelated”, this could be interpreted as the point at which local tradition determines the existence and scope of all human rights and fundamental freedoms. See Teson, F. R. *International Human Rights and Cultural Relativism*. *Virginia Journal of International Law*. 1985. Vol. 25. Pg. 869 at 870 and Tyagi, Y. K [2003(b)]. *Universalism and Regionalism in the International Law of Human Rights – Reservations to Human Rights Treaties: Means of Promoting Cultural Relativism*. [online] URL: [http://wwwsoc.nii.ac.jp/jsil/annual\\_documents/2003/autumn/houkoku-abstr/Panel%20A2%20Tyagi%20paper.pdf](http://wwwsoc.nii.ac.jp/jsil/annual_documents/2003/autumn/houkoku-abstr/Panel%20A2%20Tyagi%20paper.pdf). Accessed 18/04/2005

<sup>109</sup> Jones, P. *Op. Cit.* Pg. 27 at 29.

### 3.1 The Basis of Cultural Relativism: “West Versus the Rest”

It is clear that the crux of the cultural relativist challenge attempts to discredit the legitimacy of the United Nations universal human rights ethos. But on what basis do relativists so strongly resent the idea of universally applicable rights? And are their grievances genuinely defensible misgivings or merely a convenient ruse which is invoked by states in an attempt to shield some questionable human rights practices?

The most widely recognised challenge to universality manifests itself in the “West versus the Rest” debate: relativists challenge the universality of human rights on the basis of the origins of the modern human rights regime. It is widely argued by relativists that international human rights are a product of the Western world, and as such it is their belief that these rights cannot apply to non-western cultures.<sup>110</sup> Indonesian and Chinese representatives, for example, have both made clear comments intended to question the legitimacy of so called Western human rights, expressing their concern over their cross-cultural applicability. The Indonesian Minister for foreign affairs stated that “the sovereign equality of states and the national identity of peoples [means that] no country or group of countries should arrogate unto itself the role of judge, jury and executioner over other countries”.<sup>111</sup> The comments are a clear reference that the West cannot sit in judgement over other countries human rights standards, which are closely related to their national identity. Likewise, China has argued that “the concept of human rights is a product of historical development. It is closely associated with specific social, political and economic conditions and the specific history, culture and values of a particular country [and consequently] one should not and cannot think of the human rights standard and model of certain countries as the only proper ones and demand all other countries to comply with them”.<sup>112</sup> This is an obvious swipe at the perceived Western bias of human rights, which cultural relativists argue cannot be forced upon non-Western countries by the United Nations. These comments come despite the fact

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<sup>110</sup> Tharoor, S. Are Human Rights Universal? *World Policy Journal*. 2000. Vol. 16, Issue. 4. Pg. 1 at 1/2.

<sup>111</sup> Statement by Ali Alatas, Minister for Foreign Affairs and Head of the Delegation of the Republic of Indonesia, Vienna, 14 June 1993. In Tang, J. H (ed.) *Human Rights and International Relations in the Asia-Pacific Region*. London and New York. Pinter. 1995. Pg. 228-234.

<sup>112</sup> Statement by Lui Huaqiu, Head of Chinese Delegation, Vienna, 17 June 1993. In Tang, J. H (ed.) *Human Rights and International Relations in the Asia-Pacific Region. Op. Cit.* Pg. 213-217.

Indonesia and China have respectively ratified six and five of the core human rights treaties, and therefore officially accept the norms they contain.<sup>113</sup>

Claims of Western bias have led some international figures to assert that “the political predominance of one group of countries in international relations... cannot provide a licence for imposition of a set of guidelines and norms for the behaviour of the entire international community...”.<sup>114</sup> The perceived Western origins of the international human rights regime therefore generates the related allegation that international human rights standards have been proclaimed simply in a bid to manipulate other states, amounting to a thinly disguised form of Western imperialism which fails to recognise or support any non-Western values or traditions. If universal human rights are completely insensitive to cultural difference, it is fair to conclude that “the complete denial of national and sub-national ethical autonomy and self determination is dubious at best”.<sup>115</sup> It was and is feared that the West adopts the pretext of human rights as a stalking horse in an attempt to achieve global dominance over its poorer developing neighbours.<sup>116</sup> China, for example, argues that the United States has used human rights “as a tool to pursue its power politics and hegemony in the world”.<sup>117</sup> In fact Jones goes as far as to argue that universalism asserts itself as a unique doctrine in terms of status and applicability, but in reality represents a doctrine which is no more than a local prejudice of the Western world: it claims to provide a voice for all but is no more than a doctrine of some, “made all the more insidious as it licenses its own imposition upon the whole of humanity”.<sup>118</sup> The problems of perceiving the human rights movement of the United

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<sup>113</sup> Indonesia has ratified International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, the Convention on the Rights of the Child, the International Convention on the Elimination of Racial Discrimination, Convention on the Elimination of Discrimination against Women and the Convention against Torture, while China has ratified the International Covenant on Economic Social and Cultural Rights, the Convention on the Rights of the Child, the International Convention on the Elimination of Racial Discrimination, Convention on the Elimination of Discrimination against Women and the Convention against Torture.

<sup>114</sup> Statement by Iranian Deputy Foreign Minister Dr Mohammed Javad Zarif, Asian Regional Meeting on Human Rights, Bangkok, 31 March 1993.

<sup>115</sup> Donnelly, J. Cultural Relativism and Universal Human Rights. *Human Rights Quarterly*. 1984. Vol. 6. Pg. 400 at 402.

<sup>116</sup> Boyle, K. Stock-taking on Human Rights: The World Conference on Human Rights, Vienna 1993. *Political Studies*. 1995. Vol. 43, Issue 1. Pg. 79 at 84.

<sup>117</sup> Opinion. *Vote for Justice, Embarrassment for US*. People's Daily (China). 4 May 2001. [online] URL: [http://english.people.com.cn/english/200105/04/eng20010504\\_69258.html](http://english.people.com.cn/english/200105/04/eng20010504_69258.html). Accessed 19/12/2008.

<sup>118</sup> Jones, P. *Op. Cit.* Pg. 27 at 29.

Nations as a manifestation of neo-colonialism are obvious: no country will blindly succumb to rule dictated by the wants and desires of another state,<sup>119</sup> and the eminence of political autonomy derived from state sovereignty offers states an apparently legitimate excuse to retract from the international system of human rights under the United Nations.

The problem, however, is that culture and rights do not always coincide, and if a cultural practice clearly violates the most fundamental of an individual's rights, should it be supported – or even tolerated – merely because it is a cultural tradition? Does culture override all competing considerations? Of course not. Let us consider female genital mutilation (FGM), for example. The term female genital mutilation encompasses a variety of procedures which the World Health Organisation says involves “the partial or total removal of the external female genitalia or other injury to the female genital organs for non-medical reasons”.<sup>120</sup> There are four commonly recognised “types” of circumcision: these range in severity from a slight, symbolic, incision on the genitals, to the most extreme excision whereby all of the external genitalia are removed and the vaginal opening is stitched together, leaving only a matchstick sized opening to allow the flow of urine and menstrual blood. These extreme and dangerous procedures are generally carried out without the use of anesthetic and in unsanitary conditions which, unsurprisingly, often results in dire and life-threatening consequences for the individual concerned. Recent research estimates that up to one hundred and forty million women and girls have undergone the procedure,<sup>121</sup> and a further three million are at risk every year.<sup>122</sup>

The practice of female genital mutilation is an unacceptable assault on the rights of

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<sup>119</sup> Charlesworth, Prof. H. Cultural Diversity in International Law. *Human Rights, Faith and Culture*. Proceedings of the Australian Bahá'í Studies Conference. 7-8 November 1998. Pg. 34. [online] URL: [www.juxta.com/absproceedings-en-1.0.pdf](http://www.juxta.com/absproceedings-en-1.0.pdf). Accessed 19/04/2005.

<sup>120</sup> World Health Organisation. Female Genital Mutilation: Factsheet 241. May 2008. [online] URL: <http://www.who.int/mediacentre/factsheets/fs241/en/index.html>.

<sup>121</sup> Eliminating Female Genital Mutilation: An Interagency Statement. OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM, WHO. 2008. [online] URL: [http://www.who.int/reproductive-health/publications/fgm/fgm\\_statement\\_2008.pdf](http://www.who.int/reproductive-health/publications/fgm/fgm_statement_2008.pdf). Accessed 14/11/2008. Pg. 4.

<sup>122</sup> *Ibid.* Pg. 4.

women and girls: it is a graphic embodiment of female subordination “that is deeply entrenched in social, economic and political structures”<sup>123</sup> and therefore reinforces the inequality of women in society. It therefore violates the very object and purpose of the Convention Eliminating Discrimination against Women, as well as the prohibition on sex discrimination in the Children's Convention.<sup>124</sup> In addition it violates a panoply of other basic human rights<sup>125</sup>; given that it is almost exclusively inflicted on minors,<sup>126</sup> it violates many of the rights in the Children's Convention which aim to safeguard the best interests of the child<sup>127</sup>; it violates the attainment of the highest possible standard of physical and mental health protected by Article 12 of the International Covenant on Economic Social and Cultural Rights<sup>128</sup>; and it violates the absolute and non-derogable right to freedom from torture, cruel, inhuman or degrading treatment.<sup>129</sup> Given that the procedure can result in death, it may also violate the most fundamental of rights, the inherent right to life.<sup>130</sup>

The practice of FGM is quite clearly “a critical human rights issue”<sup>131</sup>: the mutilation of an individual's genitalia in this way is an extremely harmful practice which has no associated health benefits but numerous, often severe, short and long term consequences.<sup>132</sup> So why, then, is it so widely practiced; what perpetuates such a dangerous practice? Quite simply, it continues because it has become an entrenched cultural custom in those communities in which it is practiced, justified by the desire to enhance a girls marriageability by preserving her virginity and morality through the

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<sup>123</sup> *Ibid.* Pg. 5.

<sup>124</sup> Article 2. Convention on the Rights of the Child.

<sup>125</sup> An Interagency Statement produced by OHCHR, UNAIDS, UNDP, UNECA, UNESCO, UNFPA, UNHCR, UNICEF, UNIFEM and WHO lists 25 international and regional human rights treaties and documents which provide protection against female genital mutilation. Eliminating Female Genital Mutilation: An Interagency Statement. *Op. Cit.* Annex 4, Pg. 31.

<sup>126</sup> Eliminating Female Genital Mutilation: An Interagency Statement. *Op. Cit.* Pg. 4.

<sup>127</sup> For example, the Article 19(1) obligation to protect the child from all forms of violence; Article 24(1) right to the highest attainable standard of health; and Article 37(1) right to freedom from torture or other cruel, inhuman or degrading treatment. Convention on the Rights of the Child.

<sup>128</sup> Article 12. International Covenant on Economic, Social and Cultural Rights.

<sup>129</sup> Article 7. International Covenant on Civil and Political Rights.

<sup>130</sup> *Ibid.* Article 6.

<sup>131</sup> Eliminating Female Genital Mutilation: An Interagency Statement. *Op. Cit.* Pg. 21.

<sup>132</sup> World Health Organisation. Female Genital Mutilation: Factsheet 241. *Op. Cit.* ; FORWARD. Female Genital Mutilation: Information Pack. 2002. [online] URL: <http://www.forwarduk.org.uk/key-issues/fgm> Accessed 14/11/2008.

suppression of her sexuality.<sup>133</sup> More extreme beliefs also exist which are often related to witchcraft and lack logical validation. For example, some Malian communities believe that the child will die if its head comes into contact with the clitoris during birth, and a man who enters an unexcised woman could be killed by the secretion of a poison from the clitoris upon its contact with the penis.<sup>134</sup>

As a result of these beliefs, over centuries FGM has become deeply engrained in the cultural customs and conventions of those communities which practice it, so much so that it has traditionally been accepted “without question”.<sup>135</sup> A study undertaken by the US Department of State found that in Mali for example – where over ninety percent of females are subjected to circumcision – it is “so deeply rooted in tradition and culture that any challenge to it runs into strong social opposition and repercussions”.<sup>136</sup> Thus, there are wider social implications associated with genital mutilation: often, those questioning its merits face ostracism from the community.<sup>137</sup>

FGM persists despite the fact that twenty six<sup>138</sup> of the twenty eight African nations in which it is practiced have ratified the Convention on the Elimination of Discrimination against Women; twenty seven<sup>139</sup> have ratified the Convention on the Rights of the Child; twenty seven<sup>140</sup> have ratified the International Covenant on Civil and Political Rights; and all are party to the African Charter on Human and Peoples Rights. As stated above, FGM violates various provisions protected in all of these international instruments. Moreover, a growing number of countries have moved to enact domestic legislation criminalising the practice: in fact, half of the twenty eight countries where the practice is “endemic” have introduced legislation forbidding it and a further seven countries have incorporated anti-FGM legislation into their constitutions or criminal

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<sup>133</sup> Eliminating Female Genital Mutilation: An Interagency Statement. *Op. Cit.* Pg. 6.

<sup>134</sup> US Department of State. [online] URL: <http://www.state.gov/documents/organization/10222.pdf>. Accessed 10/10/2008.

<sup>135</sup> Eliminating Female Genital Mutilation: An Interagency Statement. *Op. Cit.* Pg. 5.

<sup>136</sup> US Department of State. *Op. Cit.*

<sup>137</sup> Eliminating Female Genital Mutilation: An Interagency Statement. *Op. Cit.* Pg. 5.

<sup>138</sup> Somalia and Sudan are not party to the Convention of the Elimination of Discrimination against Women.

<sup>139</sup> Somalia has signed but not yet ratified the Convention on the Rights of the Child.

<sup>140</sup> Guinea-Bissau has not yet ratified the International Covenant on Civil and Political Rights.



laws.<sup>141</sup> Given the barbaric nature of intrusive genital mutilation, the passing of criminal liability for FGM is an extremely positive and welcome progression in the search to protect human rights.

Ensuring the law is respected and enforced, however, is another matter: a study published in 2000 found that prosecutions had been brought in only four of the twenty eight African countries in which FGM is practiced.<sup>142</sup> A 2008 inter-agency statement on eliminating FGM also found that the reduction in its prevalence was not as significant as one would hope, despite the existence of laws prohibiting its practice.<sup>143</sup> Clearly, given the fact that FGM is a firmly established custom among practicing communities, laws in isolation are not sufficient: criminalisation must be accompanied by a campaign of social change, whereby NGO's, outreach services and health programmes actively seek to change these entrenched beliefs by educating the community and empowering women. Of course this is no mean feat: it will take a sustained campaign to change social attitudes. If human rights are to prevail, one must not seek to influence the views of a few individuals: it is the attitudes of the community at large which must be modified. While it is cultural custom which has perpetuated the abhorrent practice, culture cannot be relied on as a justification for its continuation: universal human rights must prevail for the sake of millions of young women and girls. "Cultural relativism" must not be accepted as a defense to violative practices such as these.

While it is evident that culture cannot stand alone as a self explanatory justification for human rights violation, the problem the United Nations faces in furthering the universality of human rights is that the perceived "Western bias" of the regime has nevertheless gained a firm foothold in human rights discourse. Consequently, it is heavily relied upon to discredit the legitimacy of international human rights as norms capable of influencing the practices of all nations. The rhetoric of universalism has been seriously compromised, and this is a prime factor in the United Nations failure to convert its aspirations into actions. But is the allegation of bias justified?

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<sup>141</sup> Ending Female Genital Mutilation. World Health Organisation. [online] URL: <http://www.who.int/reproductive-health/fgm/ending.htm> Accessed 14/11/2008.

<sup>142</sup> *Ibid.*

<sup>143</sup> Eliminating Female Genital Mutilation: An Interagency Statement. *Op. Cit.* Pg. 13.

At face value, one could conclude so, which is why the clamour of cultural relativism has not died, despite the passing of more than half a century. The composition of the United Nations at the time of its founding is perhaps the most important factor behind claims of Western bias: in an age before mass decolonisation, the map of 1945 was vastly different to that of today, which seems to support the allegation that the newly created United Nations was a distinctly Western affair. Brems, for example, argues that the states which voted in favour of the Universal Declaration “can hardly be held representative for the contemporary world community”.<sup>144</sup> Given the composition of the United Nations and the heavily colonised wider international community, it is almost taken as a matter of historical fact that human rights are inherently biased towards Western values at the expense of others. Even Donnelly seems to concede the point, stating that “the concept of human rights is an artifact of modern Western civilisation”.<sup>145</sup> In the face of continued affirmations supporting the truth of Western bias, it is hardly surprising that the United Nations has so far failed to achieve its universal promises. Consequently, cultural relativists argue that the Western bias of human rights negates the universal quality championed by the United Nations: at best they are of limited relevance and applicability to other cultures.<sup>146</sup>

However, one would beg to argue that international human rights are not the partisan values they are frequently portrayed as being. The fact is that early membership of the United Nations extended beyond the “West” alone: all regions and continents were represented in the United Nations, and the forty eight states that voted in favour of the Universal Declaration were not exclusively Western, despite Brems’ earlier accusations.<sup>147</sup> Geographically, the United Nations was not an exclusively Western

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<sup>144</sup> Brems, E. *Op. Cit.* Pg. 6.

<sup>145</sup> Donnelly, J (1982) Human Rights and Human Dignity: An Analytic Critique of Non-Western Conceptions of Human Rights. *Op Cit.* Pg. 303 at 303. See also, Caney, S. *Human Rights, Compatibility and Diverse Cultures.* Pg. 51 at 52. In Caney, S and Jones, P (ed). *Op. Cit.*

<sup>146</sup> Pritchard, S. The Jurisprudence of Human Rights: Some Critical Thought and Developments in Practice. *Australian Journal of Human Rights.* 1995. Vol. 2, No. 1 [online] URL: <http://www.austlii.edu.au/au/journals/AJHR/1995/2.html>. Accessed 23/01/2004.

<sup>147</sup> The forty eight states which voted in favour were Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Canada, Chile, China, Colombia, Costa Rica, Cuba, Denmark, the Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxembourg, Mexico, Myanmar, Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay,

organisation at the time of the Universal Declarations creation. But is it ideologically so: are the values it stands for distinctly Western?

Claims persist that human rights treaties do not represent a true codification of genuinely universal, internationally accepted rights determined by the international community as a whole.<sup>148</sup> Witte goes as far as to say that “it is simple ignorance to assume...the first international documents were truly universal statements on human dignity and human rights”.<sup>149</sup> According to this view, the Universal Declaration does not represent rights which were recognised as universally valid at the time of its creation, and thus its creation alone does not self evidently prove the universality of its provisions.<sup>150</sup> Rather, its drafting simply signaled the start of a movement to integrate the ideals it expressed into the practices of its signatories.<sup>151</sup> When one considers the rights contained in the Declaration, and indeed international human rights treaties at large, one must question the merits of such a statement, however: it would seem to be an unjustified and unfair allegation. Could any nation, regardless of culture, really claim that the rights expressed in the Declaration do not apply to its citizens? Ask China, or Iran, or Zimbabwe, for example, to identify those rights which do not apply to their citizens and it is likely they would come up short of any defensible answer. After all, what rights does it contain that could be considered culturally repugnant? None, one would beg to argue. In a similar vein, Tharoor also questions which of the rights in the International Covenant on Civil and Political Rights are so objectionable to states:

“...what can one find [in the Covenant] that someone in a developing country can easily do without? Not the right to life, one trusts. Freedom from torture? The right not to be enslaved, not to be physically assaulted, not to be arbitrarily arrested, imprisoned, executed? No one actually advocates in so many words the

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Peru, Philippines, Siam (Thailand), Sweden, Syria, Turkey, United Kingdom, United States, Uruguay, Venezuela.

<sup>148</sup> Pritchard, S. The Jurisprudence of Human Rights: Some Critical Thought and Developments in Practice. *Australian Journal of Human Rights*. 1995. Vol. 2, No.1 [online] URL: <http://www.austlii.edu.au/au/journals/AJHR/1995/2.html>. Accessed 01/12/2006.

<sup>149</sup> Witte, J. Rights in the Western Tradition. *Op.Cit.*

<sup>150</sup> Brems, E. *Op. Cit.* Pg. 6.

<sup>151</sup> Clohesy, W.W. Interrogating Human Rights: What Purpose? Whose Duty? *Business and Society Review*. 2004. Vol. 109, Issue. 1. Pg. 43 at 45.

abridgment of any of these rights”.<sup>152</sup>

Such a simple question confirms that the origins of the human rights regime, whether we believe them to be Western or otherwise, should bear little relevance to the universal applicability of its values. In fact, it should matter not: the origins of the regime does not mean that the rights it contains apply any less to the rest of the international community. The source of an ideal does not determine its legitimacy and does not preclude its wider applicability.<sup>153</sup> In short, human rights “should either be considered valid or rejected; the source of an idea and its legitimacy should not be confused”<sup>154</sup>; even if the United Nations human rights movement is deemed irrefutably Western, this is not, in itself, sufficient to deny the applicability of its norms to non-Western members.<sup>155</sup> Thus, one could reasonably assume that “the fact that the[...] [the International Bill of Rights was] devised by less than a third of the states now in existence is really irrelevant”.<sup>156</sup> If one values the right to life, one surely values the right to life irrespective of which nation or region first mooted it as a right worthy of international protection.

In addition, the process of treaty drafting surely also negates the possibility of evident Western bias in the norms proclaimed: all treaties are arrived at as a result of open negotiations representing all cultures and all backgrounds. This represents itself as a democratic process where small states play no less a part than their more powerful neighbours, and as Tharoor argues, many developing countries actually played an “active and highly influential” role in the drafting of the Declaration.<sup>157</sup> When one considers that the seven principle drafters of the Universal Declaration hailed from Latin America to the Middle East and East Asia<sup>158</sup> one would support this view. As a

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<sup>152</sup> Tharoor, S. Are Human Rights Universal? *Op. Cit.* Pg. 1 at 5.

<sup>153</sup> Caney, S. *Op. Cit.* Pg. 51 at 52.

<sup>154</sup> Etzioni, A [1997(a)]. Cross-Cultural Judgements: The Next Steps. *Journal of Social Philosophy*. 1997. Vol. XXVIII, No. 3. PP. 5-15.

<sup>155</sup> v.d. Anker, C. Culture and Human Rights. *Social Policy in Development Contexts Working Paper*. 2002. [online] URL: <http://www.bath.ac.uk/ifipa/GSP/wp4.pdf>. Accessed 19/04/2005.

<sup>156</sup> Tharoor, S. Are Human Rights Universal? *Op. Cit.* Pg. 1 at 3.

<sup>157</sup> *Ibid.* PP. 1-6.

<sup>158</sup> Of the seven principal drafters of the Universal Declaration of Human Rights, two were from Europe, two were from North America, one was from South America, one was from the Middle East and one was from East Asia.

result, it would seem that treaties are drafted and adopted by consensus, with the legitimate concerns of all parties given due consideration. Thus, human rights treaties represent a global social contract applicable to all nations.<sup>159</sup> Indeed, it is precisely this method of creating human rights standards which has led to the claim that practically all cultures, religions and philosophies contain principles which now appear inherent to human rights.<sup>160</sup> If human rights treaties are truly developed in such a manner, there is no room to claim that rights are ‘Western’ in origin: they have been elicited with the participation of all nations, regardless of culture, political affiliation or size.

Perhaps the only continent which was significantly under-represented in the early stages of the United Nations development is Africa: heavily colonised, its nations played little part in the early development of human rights. Yet African nations have subsequently demonstrated their acceptance of many of the rights contained in the International Bill of Rights through the creation of their own Charter of Human Rights, which protects many of the same provisions. The fundamental freedom to associate<sup>161</sup> and assemble,<sup>162</sup> express ones opinions,<sup>163</sup> practice ones religion,<sup>164</sup> and move and reside within state boundaries<sup>165</sup>; the inherent right to life<sup>166</sup> and freedom from torture<sup>167</sup>; the equality of all persons<sup>168</sup> and correlative duty of non-discrimination<sup>169</sup>; the right to work<sup>170</sup> and education<sup>171</sup>; and pursuit of the highest attainable standard of health,<sup>172</sup> for example, are common to both international and regional instruments. This is mirrored in the Arab Charter on Human Rights, which likewise protects a range of rights contained in the International Bill of Rights. Not only have non-Western nations accepted the United Nations treaties, they have positively embraced these very norms through their own

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<sup>159</sup> Tyagi, Y. K [2003(b)]. *Op. Cit.*

<sup>160</sup> Eide, A and Alfredsson, G (ed). Eide, A and Alfredsson, G (ed). *The Universal Declaration of Human Rights: A Common Standard of Achievement*. Kluwer Law International. 1999. PP. xxv-xxvi

<sup>161</sup> Article 10. African [Banjul] Charter on Human and People’s Rights.

<sup>162</sup> Article 11. *Ibid.*

<sup>163</sup> Article 9. *Ibid.*

<sup>164</sup> Article 8. *Ibid.*

<sup>165</sup> Article 12. *Ibid.*

<sup>166</sup> Article 4. *Ibid.*

<sup>167</sup> Article 5. *Ibid.*

<sup>168</sup> Article 19. *Ibid.*

<sup>169</sup> Article 2. *Ibid.*

<sup>170</sup> Article 15. *Ibid.*

<sup>171</sup> Article 17. *Ibid.*

<sup>172</sup> Article 16. *Ibid.*

regional Charters. One must question, therefore, whether claims of “Western bias” are at all justified.

The optimist would consequently conclude that states themselves have accepted that the rights proclaimed by the United Nations are universal, reasoning that states have been keen to demonstrate their approval of the treaties by actively participating in their norms through ratification. While not quite universally ratified, the United Nations human rights treaties have been widely adopted by the international community at large, which includes “non-Western” states. Moreover, the members of the United Nations have repeatedly reiterated the universality of rights, categorically stating at the 2005 World Summit – by which point the Organisation had secured universal membership – that that “all human rights are universal, indivisible and interdependent and interrelated”.<sup>173</sup> The international community as a whole has continued to proclaim the universality of human rights, which would apparently indicate a clear acceptance by all its members that the rights contained in the United Nations treaties are, indeed, universal. Moreover, non-Western states which played no part in the creation of the Universal Declaration or early treaties have nevertheless been keen to endorse their provisions. This may therefore be taken as evidence that cultural relativism cannot justify the inapplicability of international human rights norms on the basis that their initial elucidation occurred supranationally by a particular group of states. Such acceptance by member states indicates that although cultural diversity is something to be promoted, it cannot be accepted as providing conclusive support for the rejection of international treaties.

Yet such an idealist conclusion is, in practice, untenable. Yes, ratifications continue to rise across the board and there has been a steady stream of affirmations in official United Nations documents supporting the universality of rights. However, one would argue that such statements are precisely the empty universal rhetoric the United Nations has failed to convert into practice. Moreover, the fact that non-Western nations have continued to ratify the United Nations human rights treaties should not be deemed

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<sup>173</sup> General Assembly Resolution 60/1. *2005 World Summit Outcome*. Un Doc A/Res/60/1. 24 October 2005. § 121. (hereafter 2005 World Summit Outcome).

irrefutable evidence of their universality: as explained in relation to state sovereignty below, states can ill afford to cast themselves adrift of international standards, and thus ratification is the natural course of action for many states regardless of cultural concerns, especially when one considers the lack of international enforcement following ratification. To simply state that all nations have participated in the drafting of a treaty is not sufficient to ensure the realisation of its norms. As repeatedly emphasized throughout this thesis, the reality underlying ratification is not necessarily a wholehearted commitment to human rights and thus the fact that non-Western states have ratified the treaties does not in itself mean that they have accepted their terms.

### **3.2 The Implications of Cultural Relativism: Interpretation and Flexibility**

Let us then consider the implications of cultural relativism. It is important to note at this juncture that relativism does have limits, and we must draw an important distinction in this debate: we must not confuse “legitimate cultural specificity that is deeply embedded in diverse belief systems and values, and the states exploitation of this contention”.<sup>174</sup> It cannot, one argues, be invoked to flatly deny the existence of universal norms; but it does highlight the importance of cultural sensitivity in the interpretation and application of said rights. While the latter is a far more subtle manifestation of relativism, its implications for the realisation of truly universal rights are potentially just as significant: if the United Nations is unwilling to demonstrate flexibility in its approach, relativism will continue to provide states with a get out from their assumed obligations. If, however, the United Nations is able to positively address the issue of cultural sensitivity, “cultural relativism” would no longer provide states with an excuse for evading their international obligations. Thus, the ability of the United Nations to overcome this long standing debate has a real impact on the likelihood of ever securing rights which are truly accepted as being cross culturally, universally valid. While we cannot accept the manipulation of cultural relativism for a states own ends, we must not dismiss the principle itself out of hand: that the issue has not been resolved before now is testament to the fact that the arguments of cultural relativists cannot simply be dismissed as

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<sup>174</sup> Pollis, A. Cultural Relativism Revisited: Through a State Prism. *Human Rights Quarterly*. 1996. Vol. 18. Pg. 316 at 320.

irrelevant, but instead merit serious and detailed consideration.

One must therefore quash the idea that cultural relativism can provide states with a reasonable excuse for evading their international human rights obligations. If states were able to legitimately argue that the rights proclaimed by the United Nations have no place in their culture, the international human rights treaties would be rendered meaningless: in other words, if each and every right was culturally contingent, there should be no international human rights movement at all as nothing can be considered transculturally binding. Moreover, this absolutist stance would fatally compromise the United Nations ability to monitor the human rights practices of its members.<sup>175</sup> If a state is able to argue that the norms contained in the treaties have no place in its culture, the United Nations will be prevented from assessing the states human rights practice by reference to these norms: the state will be free from international scrutiny, and abuses of human rights may be perpetrated unhindered and unchallenged. The worry is that since cultural relativism has a firm foothold in the discourse on international human rights, there is a risk that the genuine concerns of cultural relativists may be manipulated by authoritarian regimes seeking to evade their obligations, in a bid to stave off international interference and justify blatant human rights violations.<sup>176</sup> In other words, cultural relativism may be manipulated into a shield against international scrutiny; a smokescreen behind which rights are violated with impunity while the offending state insulates itself from criticism under the banner of culture.<sup>177</sup> Such a position is catastrophic to the likelihood of ever securing truly universal human rights standards. It is also untenable: it prevents any moral judgements being made over anyone, but “our moral sense strongly urges us to express our concern about genocide, torture, rape and other such acts, wherever they occur”.<sup>178</sup> Thus, the “internationalisation” of human rights through the United Nations treaty system aims to provide a check against the

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<sup>175</sup> Lee, Prof Dr Z.E. Some Issues on the Universality-Cultural Relativity Debate on Human Rights. *Challenges of Globalisation for Human Rights in Asia – Roles of Catholic Human Rights Professionals* 1997. [online] URL: <http://icmica-asia.freehosting.net/pub/bangkok/zosimo.html>. accessed 06/01/2004.

<sup>176</sup> Patman, R.G. International Human Rights after the Cold War. Pg. 1 at 15. In Patman, R.G (ed). *Universal Human Rights?* Macmillan Press Limited. 2000.

<sup>177</sup> Pollis, A. Cultural Relativism Revisited: Through a State Prism. *Op. Cit.* Pg. 316 at 324. see also, Ghai, Professor Y. In Charlesworth, Prof H. *Cultural Diversity in International Law. Op. Cit.* Pg. 34 at 35.

<sup>178</sup> Etzioni, A [1997(b)]. *Op. Cit.*



otherwise unhindered powers of the modern state.<sup>179</sup>

Does this mean that cultural relativism should be condemned as a nothing more than a convenient clothes horse for the repression and rejection of universal rights? No, one would argue not. While it may be hoped that dismissing cultural relativism as a legitimate concern would be sufficient to banish it as a challenge to universal human rights, this is not so. To arrogantly reject the very possibility that another side of the coin exists is tantamount to universal suicide by the United Nations: it merely fans the flames of a more defiant and determined defence of relativity at the expense of universality. But this need not be the case: the possibility of universal rights need not be rejected entirely in order to address the concerns of cultural relativism.

In fact, it is argued that the absolute rejection of the United Nations human rights norms is not necessarily the result desired by most proponents of culturally specific rights. Rather, it is submitted that the central tenet of the cultural relativist debate is not the total abandonment of the rights proclaimed as universal in the treaties. The issue seems to be more concerned with the interpretation of these rights, not necessarily their fundamental applicability. By questioning the universal validity of norms, cultural relativists are perhaps more accurately highlighting the importance of ensuring that the United Nations treaty rights are capable of a culturally sensitive interpretation, in spite of their universal character. It is argued that this is an entirely reasonable motive: there must be a vital distinction drawn between universality and uniformity. The idea of universal human rights should not be confused with rigid uniformity, which is an entirely different proposition. The norms tabulated by the United Nations, although universal, could never be applied with absolute rigidity: it is wholly unrealistic to presume that a single set of immutable rights could apply exactly to diverse nations. Thus, as cultural relativists assert, there must be a degree of latitude in the interpretation of treaty rights: universal human rights may be legitimately adapted according to the culture they are being exercised in, with different states interpreting and prioritising human rights in a manner consistent with their cultural obligations.

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<sup>179</sup> Henkin, L. *The International Bill of Rights*. 1981. pp. 12-13 referred to by Donoho, D.L [1991]. *Op. Cit.* Pg. 345 at 358.

Even if the United Nations ultimately succeeds in its quest for universal ratification, this should not be taken to mean that there is no need to take into account differences within and between nations. Rather, it should be indicative of the fact that nations have signed up to a broad norm which is flexible enough to apply cross culturally. States agree to rights in international treaties on the basis that there is implicit understanding that they are able to interpret the rights according to the peculiarities of their own societies.<sup>180</sup> Such subjectivity is imperative: it stems from the very nature of human rights founded on respect for human dignity. As was highlighted earlier, human dignity is presumed by the United Nations to be a self evidently universal concept. This assumption, however, is strongly contested by cultural relativists who instead argue that human dignity is a quintessentially subjective concept, incapable of abstract universal definition. Dignity, just as beauty, “lies in the eyes of the beholder”: how can someone define its essential characteristics with which all others would agree.<sup>181</sup> If such subjective judgements are inherent in defining dignity, its position as a consistent informant of human rights practice is inevitably questioned: one must question exactly “how much “universality” the concept of human dignity can muster, when agnostic, theistic and secular view-holders all have something different to say about what human dignity is”.<sup>182</sup>

The United Nations has, to a large extent, left itself open to this charge from relativism: the continued failure to elaborate on its meaning and content has merely compounded the belief that dignity is an abstractly subjective value. Lacking definition from the United Nations, there is much room to argue over the merits of human dignity as universalism's founding pillar. If the allegation that there is “no coherent conception of dignity [which] emerges transculturally”<sup>183</sup> is correct, surely the rights required to protect dignity necessarily differ between nations and cultures? In fact, this thesis argues that while dignity is a malleable value influenced by many different factors, it can

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<sup>180</sup> Ostrovsky, A.A. What’s So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals. *Hanse Law Review*. 2005. Vol. 1. Pg. 47 at 48.

<sup>181</sup> Lee, M.Y.K. Universal Human Dignity: Some Reflections in the Asian Context. *Op. Cit.* Pg. 1 at 8.

<sup>182</sup> *Ibid.* Pg. 1 at 8.

<sup>183</sup> McCrudden, C. Human Dignity. *Op. Cit.* Pg. 25.

nevertheless lay a defensible claim to universality. Feldman is correct when he states that there is little or no common understanding about what dignity requires, given that there is no unanimous agreement on what constitutes “the good life”.<sup>184</sup>

However, one would argue that this does not impugn the validity of dignity as a concept: as a concept, dignity is fundamentally universal; every individual from every culture is entitled to their dignity. That is not to say that the realisation of dignity with require identical outcomes for all individuals: although universal, dignity can have different subjective implications for different individuals. Kant recognised that while all human beings must be afforded an autonomous will in order to pursue their own ends, those ends would not be the same for everyone. The fact that the substance and content of what dignity requires varies does not impugn or defeat the universality of human rights founded on protection of human dignity. Rather, it simply confirms and reinforces the worldwide general applicability of human rights by demonstrating that the building blocks for achieving dignity must be laid irrespective of any contingent conceptions of its content.<sup>185</sup> Rather than being consigned as a concept of little relevance to “non-western” cultures which provides little guidance to human rights, one must accept that human dignity simply has different connotations for different societies and individuals, and no two conceptions of dignity will be exactly alike.<sup>186</sup> Take an example to illustrate this point: while it may affront a Western woman to be required to cover her body entirely, it unquestionably protects the dignity of many millions of Muslim women. The dignity of each individual is equally entitled to protection, and thus international human rights must be sufficiently flexible to ensure this is so. What this means in practice for the United Nations is that human rights, while universal, must be capable of cultural interpretation. The ability to marry common values and diverse societies is regularly demonstrated by the European Court of Human Rights in its deliberations on the interpretation and applicability of human rights throughout Europe, through its use of the “margin of appreciation” doctrine. This judicial device could, it is argued, provide the United Nations with a much needed mediator in the battle to secure

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<sup>184</sup> Feldman, D. Human Dignity as a Legal Value: Part II. *Public Law*. 2000. Pg. 61 at 75.

<sup>185</sup> *The Philosophical Foundations of Human Rights*. In Symonides, J (ed). *Human Rights: Concepts and Standards*. *Op. Cit.* Pg. 43.

<sup>186</sup> Lee, M.Y.K. Universal Human Dignity: Some Reflections in the Asian Context. *Op. Cit.* Pg. 1 at 1.

universal rights in an inescapably multicultural community.

Allowing a culturally sensitive interpretation of human rights does not appear to pose a significant threat to the realisation of universal rights. However, the fact that the United Nations has made little positive progress towards recognising this is the real problem. The Vienna Declaration appeared to confirm the importance of culture in human rights by stating that "...the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind...",<sup>187</sup> but in practice a hollow statement such as this does little more than paper over the ever growing division on the issue. It is little more than an empty gesture designed to pacify those countries concerned over the cross cultural applicability of human rights, but which has negligible practical impact. Without a concerted effort to integrate cultural diversity and universal human rights, the tag of "cultural relativism" has almost become a self explanatory shield against insensitive universalism. Cultural diversity cannot be cast aside lightly, and the United Nations theory of universal human rights must demonstrate sufficient flexibility to accommodate it. If it fails to do so, universal human rights will never become a practical reality. In a world where people are committed to a multitude of beliefs the United Nations must strive to ensure that the universal rights contained in the treaties may be compatible with those beliefs. Only then is there a chance of progressing from the realm of academia to actually achieving a practically effective system of universal rights throughout the entire international community.

What the United Nations has failed to do is demonstrate exactly how the harmonisation of culture and universal rights may be achieved. In fact, it has paid little more than lip service to it, preferring to always reiterate the imperative universality of human rights. This has merely acted to exacerbate the tension between the two schools, to such an extent that universalists and cultural relativists view their respective adversaries with such contempt and skepticism that it is commonly felt that the two ideologies are entirely incapable of mutual co-existence. Each proposition starts from a seemingly defensible basis but misinterprets, exaggerates and distorts<sup>188</sup> to such an extent that the

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<sup>187</sup> Part I § 5. Vienna Declaration and Programme of Action.

<sup>188</sup> Parekh, B. Pluralist Universalism and Human Rights. Pp. 284-286. In Smith, R.K.M and v.d. Anker (ed).

credibility of both suffers. At such an impasse, it is inevitably the advancement of human rights that suffers the most, and “we the people” are left to bear the brunt of the fallout.

But why should a theory of universal rights take account of cultural diversity? The simple reason is this: any effective theory of international human rights is necessarily a practical theory. It must not be limited to the pages of textbooks and the minds of scholars, but is concerned with what we, as humans, should be able to do and what we should not have to suffer. Thus, in a world where people are committed to a multitude of beliefs the United Nations must strive to ensure its human rights regime is as compatible as possible with those beliefs, in order that it should make the transition from the realm of academia to achieve practical effect throughout the international community. If the United Nations cannot achieve this, no matter how morally commendable its theory may be, it will remain only a theory: diversity is an essential feature of human dignity<sup>189</sup> and one which international human rights will ignore at its peril.<sup>190</sup> For the sake of universal human rights, we must move beyond head shaking and finger pointing, and take real steps towards a sustainable theory of rights.<sup>191</sup>

### **3.3 The Margin of Appreciation: Reconciling Universal and Relative**

Ultimately, if the United Nations is to protect rights and respect culture at the same time, there must be reconciliation: we must draw on the defensible basis of each doctrine in order to produce a theory of human rights which recognises the “dialectical interplay of universality and diversity”.<sup>192</sup> By drawing on accumulated knowledge and past experience, it is possible to begin this reconciliation and reformulate human rights theory. By challenging traditional assumptions about rights, the international community stand best placed to achieve their goals. Although generally presented as two

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*The Essentials of Human Rights*. Hodder Arnold. 2005.

<sup>189</sup> Article 4. Universal Declaration on Cultural Diversity.

<sup>190</sup> Jones, P. *Op. Cit.* Pg. 27 at 30-31.

<sup>191</sup> Evans, T. Universal Human Rights: ‘As Much Round and Round As Ever Onward’. *The International Journal of Human Rights*. 2003. Vol. 7, No. 4. Pg. 155 at 160-2 and 165-6

<sup>192</sup> Parekh, B Pluralist Universalism and Human Rights. Pp. 284-286. In Smith, R.K.M and v.d. Anker (ed). *Op. Cit.*

incompatible extremes, one would argue that the “inherent tension”<sup>193</sup> between cultural relativism and universalism can, in fact, be mitigated.

In this regard, the United Nations could follow the example of the European Court of Human Rights, which attempts to marry the diversity of autonomous nations with the commonality of universal human rights through the application of its margin of appreciation doctrine. The margin of appreciation is a tool of interpretation which permits diversity within the framework of universality: it is used to draw the line between what each country may decide and what is so fundamental that it entails absolute compliance from all countries, whatever their culture.<sup>194</sup> The international human rights regime faces a tough challenge given that it aims to “ensure co-existence and a common aim in a fundamentally pluralistic society”.<sup>195</sup> The margin of appreciation would, one argues, afford the United Nations with a possible solution to this conundrum. It is a doctrine which mitigates the inherent tension in international human rights law between universality and diversity; between international and national; between local and global. According to Mahoney, the margin of appreciation is the most effective method of addressing such tension.<sup>196</sup>

So how exactly does the margin of appreciation doctrine work? And how does it contribute to increased human rights protection in an enormously diverse international community? Just as with the United Nations human rights treaties, pursuant to Article 1 of the European Convention on Human Rights it is first and foremost the responsibility of member states to protect the rights and freedoms set forth.<sup>197</sup> The margin of

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<sup>193</sup> Donoho, D.L [2006]. Human Rights Enforcement in the Twenty-First Century. *The Georgia Journal of International and Comparative Law*. 2006. Vol. 35. Pg. 1 at 9.

<sup>194</sup> Mahoney, P. Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgements. *European Human Rights Law Review*. 1997. Issue 4. Pg. 364 at 370; and Ostrovsky, A.A. What's So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International Human Rights Tribunals. *Op. Cit.* Pg.47 at 48.

<sup>195</sup> Weil, P. Vers Une Normativité en Droit International. *RGDIP*. 1982. Vol. 86, No. 5. As quoted in Teraya, K. Emerging Hierarchy in International Human Rights and Beyond: From the Perspective of Non-Derogable Rights. *European Journal of International Law*. 2001. Vol. 12, No. 5. Pg. 917 at 918.

<sup>196</sup> Mahoney, P. Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgements. *Op. Cit.* Pg. 364 at 371

<sup>197</sup> Article 1 of the Convention reads: “High Contracting Parties shall secure to everyone the rights set forth in this Convention.” See also Reid, K. *A Practitioner's Guide to the European Convention of Human Rights*. Sweet and Maxwell. 1998. Pg. 21

appreciation is therefore a method of interpreting the Convention which posits the Court as subsidiary to national authorities: it is the line at which international supervision gives way to a state party's discretion in enacting or enforcing its laws.<sup>198</sup> The principle is vital as, in many situations, "state authorities are... in a better position than an international judge... to make the initial assessment of the reality of the pressing social need".<sup>199</sup> The language of the margin of appreciation was first used in the case of *Lawless v Ireland* – concerning Ireland's derogation under Article 15 – when it was explained thus:

"The concept of the margin of appreciation is that a government's discharge of [its] responsibilities is essentially a delicate problem of appreciating complex factors and of balancing conflicting considerations of the public interest; and that, once the Commission or the Court is satisfied that the Government's appreciation is a least on the margin of [its] powers..., then the interest which the public itself has in effective government and in the maintenance of order justifies and requires a decision in favour of the legality of the Government's appreciation".<sup>200</sup>

As Yourow states, it is "the breadth of deference the Strasbourg organs will allow...before they will disallow a national derogation from the Convention, or before they will find a restriction of a substantive Convention right incompatible with a State Party's obligations under the Convention".<sup>201</sup>

Essentially, as the role played by the Court is intended to be primarily supervisory, there must be a degree of deference permitted to states when attempting to resolve conflicts by determining the applicability of Convention provisions.<sup>202</sup> Although the primary responsibility lies with the state to ensure compliance with the Convention and to

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<sup>198</sup> Wong, W. M. The Sunday Times Case: Freedom of Expression Versus English Contempt-of-Court Law in the European Court of Human Rights. As quoted by Yourow, H.C [1996]. *The Margin of Appreciation Doctrine in the Dynamics of the European Human Rights Jurisprudence*. Martinus Nijhoff. The Hague. 1996. Pg. 13

<sup>199</sup> *Handyside v United Kingdom*. Judgement of 07.12.1976. Application No. 5493/72. Series A, No. 24. § 48

<sup>200</sup> *Lawless v Ireland*, 1 Eur. Ct. H.R. (Ser. B) at 408. 1960-1961. Quoted in Helfer, L.R and Slaughter, A-M. Toward a Theory of Effective Supranational Adjudication. *Yale Law Journal*. Vol. 107. 1997-98. Pg. 273 at 316 (footnote 175).

<sup>201</sup> Yourow, H.C [1987/88]. The Margin of Appreciation Doctrine in the Dynamics of the European Court of Human Rights Jurisprudence. *Connecticut Journal of International Law*. 1987/88. Vol. 3. Pg. 111 at 118.

<sup>202</sup> Shelton, D. The Boundaries of Human Rights Jurisprudence in Europe. *Duke Journal of Comparative and International Law*. Vol. 13, No. 1. 2003. Pg. 95 at 129/130

resolve conflicts caused by interpretation and application of the Convention provisions,<sup>203</sup> their decision remains subject to review by the Court.<sup>204</sup> The Court must therefore balance the level of judicial self-restraint with the necessity of national regulation. The two considerations are inextricably linked: a wide margin involves greater judicial restraint and a narrow margin involves the court asserting itself.<sup>205</sup> In *Handyside*, one of the most important cases in the development of the doctrine, the Court qualified its operation stating:

“Article 10 paragraph 2 does not give the Contracting States an unlimited power of appreciation. The Court, which...is responsible for ensuring the observance of those States’ engagements, is empowered to give the final ruling on whether a ‘restriction’ or ‘penalty’ is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision”.<sup>206</sup>

Thus, the margin of appreciation defers to the decision making of competent national authorities in the interpretation and application of Convention rights: a primary concern of cultural relativists, who fear insensitivity towards legitimate cultural values. The United Nations, in search of universal values, could utilise such an approach in the bid to promote human rights throughout its diverse members. In fact, it is argued that the margin could help increase the level of rights protection throughout member states: as Professor Koh argues, the process of “interaction, interpretation, and internalization” of international legal standards is vital if states are to go beyond merely conforming their behaviour when convenient, to fully complying with human rights obligations.<sup>207</sup> The margin of appreciation allows states to “appropriate the Convention and make it their own [which ultimately] brings domestic law and institutions into a deeper and more authentic relationship with the human rights standards in question”.<sup>208</sup> Human rights

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<sup>203</sup> Hutchinson, M. R. The Margin of Appreciation Doctrine in the European Court of Human Rights. *International and Comparative Law Quarterly*. 1999. Vol. 48, Issue 3. Pg. 638 at 639 and 647

<sup>204</sup> Leyla Şahin v Turkey, Judgement of 8 June 2004. § 100.

<sup>205</sup> Yourow, H.C [1996]. *Op. Cit.* Pg. 187.

<sup>206</sup> *Handyside v United Kingdom. Op. Cit.* § 48/9.

<sup>207</sup> Koh, H.H [1996/7]. Why Do Nations Obey International Law? *Yale Law Journal*. 1996/7. Vol. 106. Pg. 2599 at 2603.

<sup>208</sup> Carozza, P.G. Subsidiarity as a Structural Principle of International Human Rights Law. *The American Journal of International Law*. 2003. Vol. 97, No.1. Pg. 38 at 75.



standards would therefore be absorbed by the state and become embedded into society, as opposed to being merely painted over the surface. The vast diversity of the United Nations member states is what makes the margin of appreciation so appealing: with such significant differences throughout member states the importance of internalising human rights standards is all the more pressing if the human rights treaties are to count universally.<sup>209</sup> The margin of appreciation should therefore be viewed as allowing the contextualisation of universal standards as it maintains a common universal norm but allows it to be interpreted and applied in ways and means which respect the contextual background.<sup>210</sup> This presumption accords with the notion of human dignity as the premise for human rights: dignity, as we have seen, is an inherently pliable concept, yet it nevertheless attaches to all individuals. Human rights may be universal, but they must nevertheless be capable of subjective interpretation.

Of course one must note that the European Convention deals with only civil and political rights, yet this is not to suggest that application of the margin of appreciation doctrine need be limited only to such rights if utilised internationally. Rather, it is suggested that it could be readily transferred to the range of rights covered in the core international human rights treaties. Helfer and Slaughter believe that the margin of appreciation could be successfully transported from the regional to the international stage, suggesting that it “can form the basis of a potentially universalizable model”<sup>211</sup> in the quest to secure an effective system of supranational adjudication. When one considers the rights contained in the European Convention, it is the “fundamental freedom” Articles which are typically subject to the margin of appreciation: rights which contain limitation clauses can be legitimately restricted without necessarily being violated.<sup>212</sup> Articles 8 (private and family life), 9 (freedom of religion), 10 (freedom of expression) and 11 (freedom of assembly and association) all contain clauses to the effect that the right may be curtailed if the restriction is prescribed by law and

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<sup>209</sup> *Ibid.* Pg. 38 at 75.

<sup>210</sup> Parekh, B. *Pluralist Universalism and Human Rights*. In Smith, R.K.M and v.d. Anker, C (ed). *The Essentials of Human Rights*. *Op. Cit.*

<sup>211</sup> Helfer, L.R and Slaughter, A-M. *Op. Cit.* Pg. 273 at 277.

<sup>212</sup> See, for example, *Handyside v United Kingdom*. *Op. Cit.* § 48.

“necessary in a democratic society”.<sup>213</sup> These rights may be restricted for one or other of a number of limited interests which include the protection of the rights and freedoms of others, protection of morals, the interests of national security and the protection of public order.<sup>214</sup> These limitation clauses feature in many of the United Nations core human rights treaties, not simply the International Covenant on Civil and Political Rights. The International Covenant on Economic social and Cultural Rights, the Convention on the Rights of the Child and the Migrant Workers Convention, for example, all permit similar restrictions on rights.<sup>215</sup> Thus it is submitted that the margin of appreciation is readily adaptable to cover the rights contained in these treaties: it need not be limited to civil and political rights alone.

The operation of the margin of appreciation is regulated by two interlocking principles which inform its application: international consensus and the concept of living instrument. The level of European consensus on the protection of rights – evidenced through similar or harmonious national laws and practices throughout member states of the Council of Europe – is a decisive factor the Court will consider when calibrating the margin of appreciation, acting as a reference guide for the Court when determining the level of national discretion available.<sup>216</sup> In effect, consensus is inversely related to the margin of appreciation, with the Court more likely to grant a wider margin in the absence of any discernible Europe wide agreement.<sup>217</sup> However, where the domestic law

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<sup>213</sup> See Articles 8-11. European Convention of Human Rights.

<sup>214</sup> Limitation is permissible under Article 8 § 2 on grounds of “national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.” Article 9 § 2 is “in the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others.” Article 10 § 2 is “national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.” Article 11 § 2 is “national security or public safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State.” European Convention of Human Rights.

<sup>215</sup> Article 8, International Covenant on Economic Social and Cultural Rights; Articles 10, 13, 15. Convention on the Rights of the Child; Articles 13, 26, 39, 40. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families.

<sup>216</sup> Mahoney, P. The Doctrine of the Margin of Appreciation under the European Court of human Rights: Marvellous Richness or Invidious Cultural Relativism. *Human Rights Law Journal*. 1998. Vol. 19. Pg. 1 at 5

<sup>217</sup> Ostrovsky, A.A. What’s So Funny About Peace, Love, and Understanding? How the Margin of Appreciation Doctrine Preserves Core Human Rights within Cultural Diversity and Legitimises International

and practice of member states reveals a measure of common consensus, the state will be afforded a less discretionary power of appreciation.<sup>218</sup> Yourow acknowledges this by stating that

“just as the national margin of discretion and international supervision go ‘hand in hand’ in the oft-repeated Strasbourg formula, so too do a lack of European consensus with a wider margin and state-favourable outcomes, and the existence of progressive European consensus with a narrower margin and applicant favourable outcomes”.<sup>219</sup> Accordingly, the scope of the margin of appreciation is determined by reference to a perceptible presence or absence of consensus in the practice of the members of the Council of Europe on the substantive Convention issues involved.<sup>220</sup>

Of course, if the United Nations organs were to adopt a margin of appreciation type doctrine, they must be wary of reducing the perceptible uniform standard to a ‘minimalist’ approach, by drawing on standards which are the lowest common denominator throughout member states. To do this would be to sacrifice the provisions of the treaties for the sake of seeking a common consensus.<sup>221</sup> If the United Nations cannot readily discern harmonious values which respect international standards, it must resist the temptation to reduce the threshold for compliance in order to elicit broad consensus. Where no consensus exists neither the European Court nor the United Nations must actively seek one at the expense of international standards: they must consider whether permitting a degree of national discretion or advocating absolute compliance with the black letter law is the most appropriate approach to take in the advancement of human rights protection.

The role of European consensus is demonstrated with reference to particular situations.

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Human Rights Tribunals. *Op. Cit.* Pg. 47 at 50-56.

<sup>218</sup> “The domestic law and practice of the contracting States reveals a fairly substantial measure of common ground in this area...Accordingly, here a more extensive European supervision corresponds to a less discretionary power of appreciation.” *Sunday Times v United Kingdom* [1979] 2EHRR 245. § 59. See also, Yourow, H. C [1996]. *Op. Cit.* Pg. 193

<sup>219</sup> Yourow, H. C [1996]. *Op. Cit.* Pg. 194

<sup>220</sup> *Ibid.* Pg. 54

<sup>221</sup> See Jones, T. The Devaluation of Human Rights under the European Convention. *Public Law*. 1995. Pg. 430 at 441; and Arai, Y. The Margin of Appreciation Doctrine in the Jurisprudence of the European Convention of Human Rights. PhD Project. 1998. Pg. 232

In *Handyside*, the Court confirmed that if it is unable “to identify a Europe wide consensus on the treatment of a particular issue, the wider the margin[.] [it] is prepared to grant to the national institutions”.<sup>222</sup> *Handyside* concerned the right to freedom of expression under Article 10 of the Convention and the publication of obscene material: the applicant was the publisher of *The Little Red Schoolbook* and was charged under the Obscene Publications Act 1959<sup>223</sup> on the basis that its contents were likely to “deprave and corrupt”<sup>224</sup> those persons who read, saw or heard about the book. When asked to consider the matter, the Court concluded that

“it is not possible to find in the domestic law of the various Contracting States a uniform European conception of morals. The view taken by their respective laws of the requirements of morals varies from time to time and from place to place, especially in our era, which is characterised by a rapid and far-reaching evolution of opinions on the subject”.<sup>225</sup>

When considering the subjectivity of human dignity, one highlighted the difficulty associated with the requirements of religious dress. Indeed, this is an issue considered by the European Court in the case of *Leyla Sahin v Turkey*, when it was asked to determine whether a ban on wearing an Islamic headscarf in a higher education institution was compatible with the right to manifest one's religion under Article 9(2) of the Convention. Having undertaken a comparative study of the place of the Islamic scarf in state education the Court concluded that it

“is not possible to discern throughout Europe a uniform conception of the significance of religion in society... Rules in this sphere will consequently vary from one country to another according to national traditions and the requirements imposed by the need to protect the rights and freedoms of others and to maintain public order... Accordingly, the choice of the extent and form such regulations should take must inevitably be left up to a point to the State concerned, as it will

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<sup>222</sup> Benvenisti, E. Margin of Appreciation, Consensus, and Universal Standards. *International Law and Politics*. 1999. Vol. 31. Pg. 843 at 851.

<sup>223</sup> Obscene Publications Act 1959, as amended by the Obscene Publications Act 1964.

<sup>224</sup> Section 1(1). Obscene Publications Act 1959, as amended by the Obscene Publications Act 1964.

<sup>225</sup> *Handyside v United Kingdom*. *Op. Cit.* § 48.

depend on the domestic context concerned”.<sup>226</sup>

However, the restriction and ultimately denial of a margin of appreciation in areas where there is firm or emerging international consensus is effectively illustrated by reference to *L. and V. v Austria*, when the Court emphatically rejected the Governments arguments trying to justify the distinction between the ages of heterosexual and homosexual consent. The Court considered such a distinction to be discriminatory and in breach of Articles 8 and 14 of the Convention, having regard to the limited margin of appreciation left to the Contracting State. The Court explicitly stated that the scope of the margin of appreciation was not unlimited, but would

“vary according to the circumstances, the subject matter and the background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States...In the present case...there is an ever growing European consensus to apply equal ages of consent for heterosexual, lesbian and homosexual relations”.<sup>227</sup>

Similar sentiments had already been expressed by the Commission in *Sutherland v United Kingdom* when it was stated that “equality of treatment in respect of the age of consent is now recognised by the great majority of member States of the Council of Europe”.<sup>228</sup> Thus, the available margin of appreciation was decidedly narrow. Internationally, the United Nations bodies would have a fine line to tread: as already mentioned, consensus over the application of a right may be hard to establish.

The margin of appreciation therefore allows scope for different countries to adopt different solutions which are adapted to best suit the needs of their diverse and evolving

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<sup>226</sup> *Leyla Şahin v Turkey* [GC]. Judgement of 10 November 2005. Application No. 44774/98. § 109.

<sup>227</sup> *L. and V. v Austria*, Judgement of 9 January 2003. Application Nos. 39392/98 and 39829/98. Reports of Judgements and Decisions. ECHR 2003-I. § 49/50. See also a series of cases against the United Kingdom (*Rees v United Kingdom*. Judgement of 17 October 1986. Application No. 9532/81. Series A, No. 106; *Cossey v United Kingdom*. Judgement of 27 September 1990. Application No. 10843/84. Series A, No. 184; *Sheffield and Horsham v United Kingdom*. Judgement of 30 July 1998 (31–32/1997/815–816/1018–1019). Reports of Judgments and Decisions. 1998-V; *I v United Kingdom*. Judgement of 11/07/2002. Application No. 25680/94; and *Christine Goodwin v United Kingdom*. Judgement of 11 July 2002. Application No. 28957/95. Reports of Judgements and Decisions. ECHR 2002-VI) concerning legal recognition of the post operative sex of transsexuals when the Court restricted the available margin of appreciation over time.

<sup>228</sup> *Sutherland v United Kingdom*. Commission's report of 1 July 1997. Application No. 25186/94. Unpublished. § 59

societies.<sup>229</sup> When evaluating state practice, however, the United Nations organs must be constantly aware of the need to evolve and develop the meaning and understanding of rights: international human rights treaties must not be considered “static contract[s] frozen by the definitions and intentions”<sup>230</sup> of the period in which they were framed. Rather, they must be flexible and adaptable to changing societal conditions, allowing a dynamic interpretation.<sup>231</sup>

A combination of European consensus and the doctrine of living instrument will enable human rights bodies to determine whether a state is significantly out of step with global norms. When consensus shows that a state is significantly out of step with international opinion, the margin of appreciation will be reduced with the intention of “dragging along the reluctant state, where for reasons of local prejudice or inertia,... the state has not kept up with the understanding of the fundamental right”.<sup>232</sup> This is clearly demonstrated by a ruling of the European Court which resulted in a restriction on the margin of appreciation deferred to the United Kingdom in respect of the legal recognition of the post operative sex of transsexuals. In *Cossey v United Kingdom*<sup>233</sup> the Court held that a failure to provide legal recognition of the post operative sex of a transsexual, with the result that Mrs Cossey was denied the right to marry,<sup>234</sup> was within the permissible margin of appreciation available to the United Kingdom. There was a noticeable lack of consensus among the member states of the Council of Europe on the issue, and the Court felt bound to allow the United Kingdom a level of discretion in this sensitive area. However, more than a decade later the Court held that this was no longer an area in which the United Kingdom would be permitted latitude as there was “clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual

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<sup>229</sup> Mahoney, P. Universality versus Subsidiarity in the Strasbourg Case Law on Free Speech: Explaining Some Recent Judgements. *Op. Cit.* Pg. 364 at 369

<sup>230</sup> Yourow, H.C [1996]. *Op. Cit.* Pg. 57.

<sup>231</sup> *Ibid.* Pg. 57. In contrast, Hutchinson seems to believe there is no absolute universal minimum standard which exists. See Hutchinson, M. R. The Margin of Appreciation Doctrine in the European Court of Human Rights. *Op. Cit.* Pg. 638 at 642-643.

<sup>232</sup> Warbrick, Pg. 716 as quoted by Jones, T. The Devaluation of Human Rights under the European Convention. *Op. Cit.* Pg. 430 at 442. Although this quote applies specifically to the provisions of the European Convention, the principle can be readily transferred to the international stage.

<sup>233</sup> *Cossey v United Kingdom* [1990] 13 EHRR 622

<sup>234</sup> Article 12 of the European Convention states that “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

identity of post-operative transsexuals”.<sup>235</sup> The United Kingdom was therefore ordered to take necessary remedial action to ensure domestic law was no longer out of sync with prevalent European opinion.<sup>236</sup>

An evolutive approach to human rights protection overcomes the presumption of relativism that culture is static. Culture is rarely, if ever, static<sup>237</sup> and even those most deeply ingrained and based on religious allegiance are progressive. A natural consequence of this dynamic and malleable character is that a culture which has traditionally opposed human rights may evolve or adapt in such a way as to no longer conflict with international standards. Shari’a – historically based religious law – is undeniably part of Egyptian culture, but recent amendments to Shari’a derived legislation in Egypt demonstrates the development of the culture. Shari’a derived legislation did not permit Muslim Egyptian women to file for divorce in the same way as men: they had to go through court and provide exacting proof of abuse, while men had an absolute and unilateral right to divorce.<sup>238</sup> When Egypt ratified the Convention on the Elimination of All Forms of Discrimination Against Women, a reservation was made that the provisions would be implemented only in as far as they did not contradict Shari’a derived legislation.<sup>239</sup> Almost 20 years later, in 2000, after 10 years of negotiation and fierce opposition, legislation was amended in order to permit Egyptian women to

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<sup>235</sup> I v United Kingdom, Judgement of 03 July 2002, § 65.

<sup>236</sup> “It will be for the United Kingdom Government in due course to implement such measures as it considers appropriate to fulfill its obligations to secure the applicant’s, and other transsexuals’, right to respect for private life and right to marry in compliance with this judgment.” I v United Kingdom, Judgement of 11/07/2002. Application No. 25680/94. § 95. See also the Case of Christine Goodwin v United Kingdom, Judgement of 03 July 2002.

<sup>237</sup> Caney, S. *Op. Cit.* Pg. 51 at 58.

<sup>238</sup> Levinson, C. Egyptian Women See Divorce as Religious Right. Women’s eNews. 09/01/05. [online] URL: <http://www.womensenews.org/article.cfm/dyn/aid/2139/context/archive>. Accessed 31/03/2005.

<sup>239</sup> “Reservation to the text of article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, *without prejudice to the Islamic Sharia’s provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them*. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementary which guarantees true equality between the spouses. The provisions of the Sharia lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep. *The Sharia therefore restricts the wife’s rights to divorce by making it contingent on a judge’s ruling, whereas no such restriction is laid down in the case of the husband.*” (own emphasis added).

initiate no fault divorce:<sup>240</sup> something previously forbidden and probably unthinkable.<sup>241</sup> This effective reinterpretation of religious scripture clearly shows that even the most deeply entrenched values may be subject to change. Both the United Nations and the European Court must have the flexibility to allow the interpretation of human rights standards to be consistent with current societal concerns and demands.

The margin of appreciation, it is argued, has the potential to harmonise universal values and diverse states: with flexibility, there is no reason to presume that the United Nations core human rights treaties cannot apply to culturally distinct nations. Indeed, given the fundamental applicability of these norms to all peoples, it is vital the United Nations is able to ensure these rights are applied by all members. Where appropriate, decisions on the most suitable method of interpreting and applying the provisions of international human rights treaties can legitimately be delegated to responsible national authorities, in a manner which takes into account the importance of protecting human rights while respecting diversity. However, that is not to say the margin of appreciation is unlimited: it is always subject to supervision by the Court. Thus, “while... the margin of appreciation is wide, it is not all-embracing”.<sup>242</sup> There is, ultimately, an international minimum standard; a line below which states cannot fall. The European Convention and international human rights treaties were drafted to represent the lowest common denominator: they represent the baseline beyond which states must not fall. Thus, the United Nations international human rights treaties serve to “delineate thresholds for state compliance and not ceilings”.<sup>243</sup> It is the role of impartial international bodies to determine whether state practice meets this minimum standard. If it does not, the margin of appreciation cannot be invoked in justification of the practice. Moreover, it is the case that there can be no margin of appreciation in relation to absolute, non-derogable rights such as the prohibition on slavery or torture: these rights are non-

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<sup>240</sup> The new divorce law introduced in 2000 allows women to divorce their husbands for any reason whatsoever so long as they repaid the dowry and gave up their right to alimony.

<sup>241</sup> Moussa, J. The Cultural Debate and Personal Status Law Reform in Egypt. *Speech at Nottingham University Human Rights Conference: Whose Culture? Whose Rights? Exploring the Universality of Human Rights Law*. 12 March 2005

<sup>242</sup> *Hirst v United Kingdom (No. 2)*. Judgement of 6 October 2005. Application No. 74025/01. § 82.

<sup>243</sup> Blackburn, R and Polakiewicz, J. *Fundamental Rights in Europe: The ECHR and its Member States, 1950-2000*. Oxford University Press. Oxford. 2001. Pg. 25.



negotiable. This has been dealt with by the European Court in *Aksoy v Turkey*,<sup>244</sup> when it declared that there are no exceptional circumstances whatsoever which can justify the resort to torture: freedom from torture is an absolute right which cannot be derogated from under any circumstance.

“Article 3...enshrines one of the fundamental values of democratic society. Even in the most difficult of circumstances, such as the fight against organised terrorism and crime, the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment. Unlike most substantive clauses...Article 3 makes no provision for exceptions and no derogation from it is permissible under Article 15 even in the event of a public emergency threatening the life of the nation”.<sup>245</sup>

How, then, does one propose to reconcile absolute rights with the desire to preserve cultural specificity? Quite simply, it may not always be possible to reconcile the two competing values. If a state practice violates the absolute prohibition on torture, it cannot be accepted, and states have no room to negotiate. Advocating the use of the margin of appreciation is not to suggest that its scope is limitless, and there are some cases in which culture and human rights simply cannot co-exist. If this is the case, the United Nations organs must strive to ensure adherence with assumed human rights obligations: human rights must prevail.

In light of the foregoing analysis, it is argued that universal human rights can, with flexibility, apply to a diverse international community. Human rights must, one believes, protect all individuals equally and without distinction: they are and must be universal. The margin of appreciation may assist the United Nations in the bid to overcome this ideological divide. Its place is deeply rooted in the work of the European Court, which strives to achieve universal standards which are sensitive to cultural difference and may be readily adopted by the United Nations. This may assist the United Nations in the quest to secure universal rights by ensuring the rights proclaimed in the international

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<sup>244</sup> *Aksoy v Turkey*. Judgement of 18 December 1996. Application No. 21987/93. Reports of Judgements and Decisions. 1996-VI.

<sup>245</sup> *Ibid.* § 62.

treaties retain credibility through the dynamic, sensitive application of their provisions. Yet even so, this is only one battle the United Nations must overcome if universal human rights are ever to match the rhetorical promises of the Universal Declaration and become a practical reality. State sovereignty and reservations are two further challenges which continue to seriously impair the success of the human rights regime.

#### 4 THE DICHOTOMY OF STATE SOVEREIGNTY AND UNIVERSAL HUMAN RIGHTS

Ideologically, universal human rights assert the commonality of values in spite of territorial limitations. It has already been established that universal human rights are legitimate in spite of diversity throughout the international community: with flexibility, universal human rights are able to accommodate the particular requirements of different nations. The conflict between universality and cultural relativity is largely theoretical. However, the United Nations faces a correlative problem in realising the ideology of universal human rights which is far more practical: the omnipresence of state sovereignty, which continues to fundamentally inform all aspects of international law. State sovereignty has long challenged the United Nations human rights regime, and it stubbornly refuses to succumb to the demands of universal human rights. It is a concept of paramount importance to international relations, described by Brownlie as the “basic constitutional doctrine”<sup>246</sup> of the law of nations, and by former United Nations Secretary General Kofi Annan as the very “cornerstone of the international system”,<sup>247</sup> and has therefore come to be revered as the most sacred informant of international law and relations.<sup>248</sup> Its continued existence as an immutable pillar of international law is therefore a primary factor in the failure to realise human rights for all. While sovereignty is hailed as the cornerstone of the international system, one would question whether it can be reconciled with the demands of the United Nations human rights ideology. In fact, sovereignty of states and universal human rights seem to be inherently contradictory: sovereignty declares that states alone are the object of international law and the sole arbiter of their practice, while the international human rights regime seeks to shift the focus to the individual by prescribing the way in which the state may treat its citizens. Thus, in the realm of traditional international law, which is concerned exclusively with relations between nations, the sovereign autonomy of states has always been a principle of utmost importance. The international human rights regime embarked upon by the United Nations in 1945 therefore signified an historic milestone

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<sup>246</sup> Brownlie, I. *Principles of Public International Law*. Oxford University Press. Oxford. 6th Edition. 2003. 287.

<sup>247</sup> Annan, K.A. Quoted in Miller, J. *Checkered Flags; Sovereignty Isn't so Sacred Anymore*. New York Times. April 19. 1999. Section 4, Page 4, Column 1. [online] URL: <http://web.lexis-nexis.com/executive/>. Accessed 20/07/2007.

<sup>248</sup> Donnelly, J [2003]. *Op. Cit.* Pg. 251.

in international law, aiming to move beyond the boundaries of traditional international law by seeking to regulate the relationship between state and citizen. Obviously, such a fundamental shift in emphasis has occasioned fierce debate over the relative positions of state sovereignty and human rights: which should take precedence?

While it is widely argued that sovereignty has been eroded by the existence and importance of universal human rights, this would seem to be part of the empty rhetoric of universalism emanating from the United Nations which does not actually translate into a reality: in practice, sovereignty remains as important to states today as it was over three hundred and fifty years ago when the Treaty of Westphalia was signed. Thus, the universality of human rights has been continually challenged by a persistent dichotomy with state sovereignty.<sup>249</sup> As we will see in the examination which follows, respect for state sovereignty significantly challenges the United Nations insistence on universal and indivisible rights. This chapter will therefore explore the way in which sovereign autonomy challenges the ideology of universal human rights, arguing that while it does not seriously compromise the acceptance of universal norms, the implementation of these norms by sovereign states cannot be taken for granted. Thus, sovereignty seriously undermines the realisation of universal human rights.

#### **4.1 The Basis of International Law: Sovereignty and Non-Intervention**

In order to fully appreciate the challenges faced by the United Nations innovative human rights regime, it is essential to understand the nature of public international law and the correlative primacy of state sovereignty. This thesis does not purport to offer an all encompassing, comprehensive analysis of state sovereignty and its merits in general: it is more precisely an examination of its essence and relevance to the ideology of universal human rights. International law differs significantly from the municipal law of states. While municipal law applies within the state and regulates the relations of its citizens with each other and with the executive,<sup>250</sup> international law has a different

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<sup>249</sup> Wang, J. China and the Universal Human Rights Standards. *Syracuse Journal of International Law and Commerce*. 2001-2002. Vol. 29. Pg. 135 at 139.

<sup>250</sup> Brownlie, I. *Op. Cit.* Pg. 32.

objective. Its principal subjects are individual states, rather than individuals. A state, according to the Montevideo Convention on the Rights and Duties of States, should possess the following qualifications: “(a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with the other states”.<sup>251</sup> As Lauterpacht explains, the orthodox positivist doctrine has been explicit in the affirmation that only states are the subject of international law.<sup>252</sup> Thus, international law is simply that: the law of nations. It is concerned purely with the operation of reciprocal legal relations between sovereign states, which are the principal actors and objects of interest.<sup>253</sup>

Traditionally, therefore, international law has been entirely state centric: the state is the sole subject and individuals have, at best, only a very limited role to play.<sup>254</sup> Individuals lacked standing to assert any violation of international law, relying instead on protest by the state of nationality. This was authoritatively stated by the Permanent Court of International Justice for the United Nations predecessor, the League of Nations, in the *Mavrommatis Palestine Concessions Case*. In this case, a dispute arose between Mavrommatis and Great Britain: between a private individual and a state. The complaint was subsequently taken up on behalf of Mavrommatis by the Greek Government. Great Britain argued that the Permanent Court of International Justice did not have jurisdiction to entertain the complaint, deriving as it initially had done between an individual and a state. According to Article 34 of the Statute of the Permanent Court of International Justice the general basis of the jurisdiction given to the Court is that “only States or Members of the League of Nations can be parties in cases before the Court”.<sup>255</sup> Nonetheless, the Court argued that when the Greek Government took up the complaint

“The dispute then entered upon a new phase; it entered the domain of international law, and became a dispute between two States... It is an elementary

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<sup>251</sup> Article 1. Montevideo Convention on the Rights and Duties of States. Signed at Montevideo 26 December 1933. Entered into force 26 December 1934, in accordance with Article 14.

<sup>252</sup> Lauterpacht, *International Law*. Pg. 489. As cited in Shaw, M.N. *International Law*. Cambridge University Press. Cambridge. 2003. 5<sup>th</sup> Edition. Pg. 177.

<sup>253</sup> *v Dijk*, P. *Op. Cit.* Pg. 105 at 107/8.

<sup>254</sup> Rehman, J. *Op. Cit.* Pg. 1.

<sup>255</sup> Article 34. Statute of the Permanent Court of International Justice. 16 December 1920. Amended by Protocol of 14 September 1929.

principle of international law that a State is entitled to protect its subjects, when injured by acts contrary to international law committed by another State, from whom they have been unable to obtain satisfaction through the ordinary channels. By taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law...Once a State has taken up a case on behalf of one of its subjects before an international tribunal, in the eyes of the latter the State is sole claimant".<sup>256</sup>

Thus, any benefits of an international law system in which sovereignty and non-intervention were respected were gauged in terms of state benefit, and while advantages to citizens may be derived from such a position, this would be a merely incidental, knock-on effect, rather than a result desired in its own right.<sup>257</sup> The international human rights regime does not fit such a description, which is precisely why the realisation of universal norms has been impeded by the sovereign autonomy of its participants. There is a fundamental conflict which cannot be easily overcome.

In order to operate effectively, international law is therefore premised on the sovereign equality of states, operating on the basis of a horizontal rather than hierarchical power distribution whereby all states have equal authority.<sup>258</sup> It is of utmost importance that the state is independent: that is, it must have the "capacity...to provide for its own well-being and development free from the domination of other states...".<sup>259</sup> Each independent state is therefore sovereign, having supreme jurisdiction over its territory and resources, including the permanent population who live there.<sup>260</sup> State sovereignty, as a concept, therefore makes a broad claim about the manner in which political power

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<sup>256</sup> The Mavrommatis Palestine Concessions Case. PCIJ, Ser. A, No. 2, 1924. Pg. 12.

<sup>257</sup> Henkin, L. Human Rights and State "Sovereignty". *The Georgia Journal of International and Comparative Law*. 1995. Vol. 25. Pg. 31 at 33.

<sup>258</sup> Jackson, J.H. Sovereignty Modern: A New Approach to an Outdated Concept. *The American Journal of International Law*. 2003. Vol. 97, No. 4. Pg. 782 at 782.

<sup>259</sup> Shaw, M.N. *International Law. Op. Cit.* Pg. 189.

<sup>260</sup> Brownlie, I. *Op. Cit.* Pg. 287.

is exercised,<sup>261</sup> and a state will be politically sovereign when its will is ultimately obeyed by its citizens, and its political power is not restrained by any higher political power.<sup>262</sup> Thus, as a sovereign state is not subject to any limitation of power: it is under no obligation to recognise any higher authority beyond its territorial borders.<sup>263</sup> As Hinsley has put it, sovereignty is “the idea that there is a final and absolute political authority in the political community...and no final and absolute authority exists elsewhere”.<sup>264</sup> This is known as external sovereignty.<sup>265</sup>

#### 4.2 Universal Human Rights: A Shift in Emphasis in International Law?

So how does this fit with the ideology of universal human rights? As we have already seen, universal human rights aim to do the very thing sovereignty flatly rejects: bind states to a set of supra-national values which regulate the states treatment of its own citizens. This goes against all previously established rules of international law: prior to the advent of the human rights regime, the international community could not concern with the internal business of a state – particularly the states treatment of its own citizens – which falls within the traditionally unexaminable category of domestic jurisdiction.<sup>266</sup> International human rights therefore challenge this traditional limitation, interfering in the once sacrosanct affairs of the state and attempting to assert themselves in an area which has hitherto been strictly unexaminable. Indeed, it is fair to say that the concept of universal human rights is “a revolutionary penetration of the once impermeable state”.<sup>267</sup> But do universal human rights really undermine sovereignty, or is the opposite true? There obviously exists an elementary ideological divide between the two premises. Unfortunately for individuals the world over, it seems that when it comes down to it, sovereignty still reigns supreme, as will be demonstrated in the coming paragraphs.

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<sup>261</sup> Jacobsen, M and Lawson, S. Between Globalization and Localization: A Case Study of Human Rights Versus State Sovereignty. *Global Governance*. 1999. Vol. 5, Issue 2. Pg. 203 at 203.

<sup>262</sup> McCormick, N. *Questioning Sovereignty*. Oxford University Press. Oxford. 1999. Pg. 127.

<sup>263</sup> Rehman, J. *Op. Cit.* Pg. 15; Reus-Smit, C. Human Rights and the Social Construction of Sovereignty. *Review of International Studies*. 2001. Vol. 27. Pg. 519 at 521.

<sup>264</sup> Hinsley, F.H. *Sovereignty*. Cambridge University Press. Cambridge. 1986. 2<sup>nd</sup> Edition. Pg. 26. See also, Reus-Smit, C. *Op. Cit.* Pg. 519 at 521.

<sup>265</sup> McCormick, N. *Questioning Sovereignty*. *Op. Cit.* Pg. 129.

<sup>266</sup> Henkin, L [1995(b)]. *Op. Cit.* Pg. 31 at 32.

<sup>267</sup> *Ibid.* Pg. 31 at 39.

Universal human rights also disregard the correlative duty of non-intervention which is derived from sovereignty: according to established rules of international law, sovereign states must not interfere in matters within the domestic jurisdiction of another sovereign state. All states, as sovereign equals, are entitled to freedom from external intervention.<sup>268</sup> The importance of refraining from intervention in the matters of another state is commensurate to the importance attached to sovereignty, and is recognised in the Montevideo Convention on the Rights and Duties of States, Article 8 of which reads that “no state has the right to intervene in the internal or external affairs of another”.<sup>269</sup> The twin interlocking premises of state sovereignty and non-intervention are purposefully secured by virtue of Article 2(7) of the Charter of the United Nations, which proclaims that “Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state...”.<sup>270</sup> The Charter therefore establishes the importance of state sovereignty and non-intervention as principles of vital importance to international relations: they are pre-requisites to the development and maintenance of stable and friendly relations as the limitation of power vis-à-vis other states results in a greater degree of stability between competing states in the international community.<sup>271</sup> The fact that sovereignty is reaffirmed in the Charter is to be expected, given that the drafters were the states themselves: states, as both the drafters and the obligees of the Charter, would not draft a document which emphatically rejected their sovereignty. And therein lies the rub: the universal rights ideology instigated by the Charter of the United Nations cannot and does not sit in harmony with the promises of Article 2(7) of the Charter. Universal human rights seek to influence state practice, while the forgoing provision seems to guarantee a far more passive interest by the international community in a states internal affairs, of which human rights undoubtedly form part. Can these opposing principles be reconciled? And if not, what is the effect on the likelihood of achieving meaningful, universal human rights standards?

Quite in defiance of the norms of sovereignty and non-intervention, and in favour of

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<sup>268</sup> Brownlie, I. *Op. Cit.* Pg. 287.

<sup>269</sup> Article 8. Montevideo Convention on the Rights and Duties of States 1933.

<sup>270</sup> Article 2(7). Charter of the United Nations.

<sup>271</sup> Shaw, M.N. *International Law. Op. Cit.* Pg. 192.



universal values, Kofi Annan utilised his term as United Nations Secretary General to advocate the “Responsibility to Protect”,<sup>272</sup> seeking to engage member states as the guardians of universal human rights and asking them to oversee the actions of their peers.<sup>273</sup> Should any state fail to protect its citizens – whether from internal or external persecution<sup>274</sup> – Annan urged members to accept that it then becomes a matter for the international community at large to address. Thus, if it appears that one state is failing to adequately protect or flagrantly violating the rights of its citizens, it is the duty of the international community at large to act<sup>275</sup>: “each state has a responsibility to protect its citizens; if a state is unable or unwilling to carry out that function, the state abrogates its sovereignty, at which point both the right and the responsibility to remedy the situation falls to the international community”.<sup>276</sup>

Concerning oneself with the practices of member states is of vital importance to human rights: if universal human rights are ever to succeed in transforming the practices of member states, sovereignty must not be allowed to provide states with a *carte blancé* defence against international scrutiny. Regardless of Article 2(7), the United Nations is an Organisation created to protect its people, not to insulate Governments from outside scrutiny.<sup>277</sup> Thus, exactly as was stated by the International Criminal Court for the Former Yugoslavia,

“It would be a travesty of law and a betrayal of the universal need for justice, should the concept of State sovereignty be allowed to be raised successfully against human rights. Borders should not be considered as a shield against the reach of the law and as a protection for those who trample underfoot the most elementary rights of humanity”.<sup>278</sup>

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<sup>272</sup> Report of the Secretary General’s High-level Panel on Threats, Challenges and Change. *A More Secure World: Our Shared Responsibility*. UN Doc. A/59/565. 2 December 2004. § 203.

<sup>273</sup> Report of the Secretary General. In *Larger Freedom: Towards Development, Security and Human Rights For All*. *Op. Cit.* § 132.

<sup>274</sup> Mills, K. Reconstructing Sovereignty: A Human Rights Perspective. *Netherlands Quarterly of Human Rights*. 1997. Vol. 15, No. 3. Pg. 275.

<sup>275</sup> Report of the Secretary General. In *Larger Freedom: Towards Development, Security and Human Rights For All*. *Op. Cit.* § 135.

<sup>276</sup> Hamilton, R.J. The Responsibility to Protect: From Document to Doctrine – But What of Implementation? *Harvard Human Rights Journal*. 2006. Vol. 19. Pg. 289 at 290.

<sup>277</sup> Miller, J. *Op. Cit.*

<sup>278</sup> Prosecutor v Dusko Tadic. Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction. International Criminal Tribunal for the Former Yugoslavia. Appeals Chamber. Decision of 2 October 1995.

According to the ultimate, idealist objectives of universal human rights, state sovereignty simply cannot be absolute when human rights are at issue because, although it may in general facilitate the maintenance of peace among states, it may masquerade as a smokescreen behind which states can “violate human rights with impunity”.<sup>279</sup> Unadulterated state sovereignty would therefore delegitimise international scrutiny and allow ample scope for abuse by those authoritarian and repressive regimes wishing to deflect international attention from “cynical manipulations meant to undermine the effectiveness of rights”.<sup>280</sup> However, there should be no room for states to argue their sovereignty in defence of questionable human rights practices: it cannot be employed as a means of justifying or “excusing the inexcusable”.<sup>281</sup> Of course our moral conscience tells us that sovereignty cannot trump human rights: the United Nations was created by the people for the people, and according to Kofi Annan, “when we read the Charter today, we are more than ever conscious that its aim is to protect individual human beings, not to protect those who abuse them”.<sup>282</sup> This, of course, is the only reasonable conclusion one can draw in the interests of universal human rights but, as we shall see, this is not enough to ensure its accuracy in practice.

The foregoing examination of sovereignty reveals its implications for universal human rights. They are two diametrically opposed ideologies: while human rights are lauded as universal entitlements which transcend boundaries, state sovereignty rejects the very possibility of supra-nationally dictated norms. The international human rights movement instigated by the United Nations clearly sought to move beyond the shadow of state sovereignty, signaling a shift away from its all encompassing reach and questioning the continued plausibility of absolute sovereignty and the corresponding duty of non-intervention. There is a conflict between the previously unrivaled principle of state sovereignty and the innovative human rights regime initiated by the United Nations because they seek to protect very different interests: sovereignty guards the

<sup>279</sup> Pollis, A. Cultural Relativism Revisited: Through a State Prism. *Op. Cit.* Pg. 316 at 321.

280 Donoho, D.L [2001]. *Op. Cit.* Pg. 391 at 414.

281 Miller, J. *Op. Cit.*

<sup>282</sup> Annan, K.A. Two Concepts of Sovereignty. *The Economist*. Sept 18 1999. [online] URL: <http://www.un.org/News/press/docs/1999/sg/stories/articleFull.asp?TID=33&Type=Article>. Accessed 20/07/2007.

interests of the state, while human rights aim to safeguard the best interests of its people. These interests do not necessarily coincide. International human rights are not, therefore, concerned solely with the interaction of sovereign states; on the contrary, they are concerned with individuals, and the relationship between a state and its citizens. As such, human rights are simultaneously proscriptive and prescriptive, positive and negative: they outline the legitimate entitlements of all individuals and by doing so seek to dictate the manner of the relationship between citizen and state, setting out the responsibilities and obligations of the state in how it acts towards its people. As universal entitlements, human rights are designed to act as a limitation on the legitimate acts of a state towards its citizens.<sup>283</sup> While states make the decision on whether to ratify international human rights treaties, the norms proclaimed in the treaties are unquestionably for the benefit of individuals: they are the rights of citizens, not states.<sup>284</sup>

Thus, despite the assurances of Article 2(7) of the Charter that heralded sovereignty and non-intervention as the guiding principles of international law, the regime envisaged by the Organisations founders was surely never designed to fit this mould. It aimed to move beyond a system of law which operates on the entrenched notion that states were the sole subjects and beneficiaries to a system which posited individuals as the primary subject. Undoubtedly, the universal human rights regime embarked upon by the United Nations in 1945 was unique in terms of its aspirations, and in an era dominated by state centric positivist ideas of international law, the extension of international law to include individuals was a novel move. By advocating a system of universally applicable rights, the United Nations was purporting to penetrate the previously impermeable membrane which protects states from outside interference and dictates that states alone are the sole arbiter over the treatment of their citizens. The extent to which the United Nations has succeeded in achieving this, however, is debatable. Despite academic clamour asserting the prominence of human rights over sovereignty, the reality is that sovereignty remains fiercely guarded by states and as such presents a significant obstacle to the realisation of universal human rights.

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<sup>283</sup> Reus-Smit, C. *Op. Cit.* Pg. 519 at 519.

<sup>284</sup> Mills, K. *Reconstructing Sovereignty: a Human Rights Perspective. Op. Cit.* Pg. 267 at 289.

The obvious question arises: what does this mean for universal human rights? Can state sovereignty and universal rights coexist? When assessing the implications of sovereignty on universal human rights, one must delineate the boundaries of when sovereignty is an issue. It is argued that, when it comes to acceptance of universal ideals, sovereignty is not an insurmountable hurdle. That is, sovereignty has not precluded the formal acceptance of universal ideals: evidently, as demonstrated in chapter one, it has not hindered the widespread ratification of universal human rights treaties. This is taken by some as irrefutable evidence that sovereignty has been diminished by human rights. However, this chapter argues that sovereignty does not, in itself, affect the acceptance of universal ideals. Rather, the far more damaging effect of sovereignty is felt in terms of the implementation of those universal norms at a national level; this is the real challenge posed by sovereignty to the ideology of universal human rights. In theory, one may argue that sovereignty has been “dethroned” in light of the widespread acceptance of universal ideals: in practice this is most certainly not the case.

#### **4.3 State Sovereignty: The Rise or Fall?**

In the wake of the perpetual conflict between state sovereignty and universal rights, there has been a raft of academic debate over the possibility of achieving harmonious co-existence of the two concepts. Clearly authority regulating the relationship between the two is ambiguous, with the mixed messages contained in the Charter. So which is to come out on top? Overwhelming consensus is that, as two fundamentally opposed forces, they are mutually exclusive and cannot sit together without a radical reinterpretation or restriction of either or both concepts. As may be expected, the sword has fallen firmly on sovereignty: academics have become increasingly insistent that international human rights have gained prominence in the battle, wresting the mantle from sovereignty as the prime force at the heart of international relations. So much so, it has even been said that to claim otherwise would be a “total nonsense”<sup>285</sup>: sovereignty, it seems, must yield to the demands of international human rights.

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<sup>285</sup> Chen, L-C. *An Introduction to Contemporary International Law: A Policy Oriented Perspective*. Op. Cit. Pg. 217.

Given what is at stake, it is perhaps inevitable that academic theories on the interaction of the sovereignty and human rights would come to rest on an endorsement of diminished sovereignty. The pre-eminence of human rights epitomises the defining characteristics of an organisation created by the people for the people: although the Charter of the United Nations is grounded on the twin premises of sovereign equality and non-intervention, which operate to protect states, they do so “not because they [states] are intrinsically good but because they are necessary to achieve the dignity, justice, worth and safety of their citizens”.<sup>286</sup> The *raison d’être* of any modern peace loving state is therefore to protect its inhabitants from external and internal persecution and ensure their well being,<sup>287</sup> which obviously encompasses respect for international human rights standards. In consequence, human rights can no longer be said to fall exclusively within the closed category of domestic jurisdiction.<sup>288</sup>

But does this stack up when compared to the reality of international human rights law? It appears the fact that states have readily accepted the norms through treaty ratification has fuelled the belief that sovereignty has fallen at the hands of human rights. According to those who argue sovereignty has been eroded by the demands of the international human rights movement, the shift in emphasis in international relations has been voluntarily assumed by states. Sovereignty, a traditionally sacred international principle, is argued to represent only the starting point when considering the intricacies of international relations, not an immutable monolith. That is, sovereignty is the supreme guiding force until otherwise indicated through contrary state behaviour: according to those who argue that sovereignty has been eroded by human rights, ratification is official recognition of this fact. It seems that the primacy of universal norms at the expense of sovereignty has gained credence by relying on the fact that participation in the United Nations human rights regime is not a mandatory requirement incumbent upon all states on securing membership of the United Nations. Rather, it remains the sovereign prerogative of each state, and as such is secured only by the voluntary act of a

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<sup>286</sup> Report of the Secretary General’s High-level Panel on Threats, Challenges and Change. *A More Secure World: Our Shared Responsibility*. *Op. Cit.* § 30.

<sup>287</sup> Mills, K. *Reconstructing Sovereignty: A Human Rights Perspective*. *Op. Cit.* Pg. 267 at 273-9.

<sup>288</sup> Shaw, M.N. *International Law*. *Op. Cit.* Pg. 191.

state accepting its obligations by ratifying the treaties<sup>289</sup>: the decision of whether to sign up to international treaties is “entirely a sovereign decision for each state to take in accordance with its own constitutional and other procedures”.<sup>290</sup> The United Nations cannot force states to undertake treaty obligations, and therefore by ratifying international treaties and participating in the international human rights regime, states are supposedly voluntarily inviting their sovereignty to be compromised.<sup>291</sup>

But formal acceptance of universal ideals through ratification does not equate to the uncontested abandonment of sovereignty. Certainly, ratification is a voluntary act undertaken by each state. But as we shall see below, it does not always initiate a positive change in the human rights behaviour of the ratifying state, and consequently one cannot conclude that universal human rights have really trumped sovereignty at all.

The demise of sovereignty at the hands of universal rights may well paint a promising picture, but does it really stand up? One must conclude not. It is a commendable theory, but it is not reflective of practice. Sovereignty does not appear to have impeded the acceptance of universal norms, and while it is certainly positive that states have formally engaged these standards through ratification, this does not, in itself, signify a meaningful limitation of sovereignty on the part of the ratifying state. Indeed, it is entirely possible that states are willing to ratify treaties, and in doing so be seen to be compromising their ultimate sovereignty, because they are aware that this formal act will not automatically entail a loss of sovereignty at all.

Compliance, as will be seen in the latter part of this thesis, does not necessarily succeed ratification: it is a far more complicated issue than may otherwise appear, and is not simply determined by the existence of binding standards. Ratification is vital to any state which aims to be taken seriously on the international stage, quite irrespective of its

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<sup>289</sup> International Law Association. *International Law Association Report on the Treaty System*. 1996. [online] <http://www.bayefsky.com/reform/ila.php/pfriendly/1>. Accessed 21/09/2006.

<sup>290</sup> Alston, P. Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments. *Interim Report on Enhancing the Long-term Effectiveness of the United Nations Human Rights Treaty System*. *Op. Cit.* § 77.

<sup>291</sup> Krasner, S. *Sovereignty: Organised Hypocrisy*. 1999. Pg. 9. In Steiner, H and Alston, P. *International Human Rights in Context: Law Politics Morals*. Oxford University Press. Oxford. 2000. 2<sup>nd</sup> Edition. Pg. 576.

actual or intended human rights practices: human rights have gained such a prominent status in international relations and diplomacy that states can ill afford to openly reject the universal norms protected by the various treaties. It seems most countries have now accepted that, regardless of their sovereignty concerns, ratification of the treaties is integral to their own interests. In a new world order motivated by concern for human rights, states need to signify their approval of human rights treaties in order to maintain a strong position in the international community with regard to trade and aid. Thus, while the international human rights regime seeks to advance beyond the traditional ambit of international law by attempting to regulate the relationship between citizen and state, it continues to play a critical role in the regulation of state to state interaction. The most plausible explanation for the continued widespread acceptance of treaty provisions is therefore the “incentive”<sup>292</sup> to be aligned with positive human rights practices, combined with the comparatively low costs of ratification. And it is here, in the limited costs of membership, that sovereignty most fundamentally affects the prospect of achieving truly universal human rights standards.

At face value, it is legitimate to conclude that “international supervision is valid, and states are accountable to international authorities for domestic acts affecting human rights”.<sup>293</sup> This is what states are signing up to when they become party to an international human rights treaty: they promise to carry out their obligations in good faith, and subject themselves to external supervision from the international community at large. Thus, officially, international supervision is valid and states are accountable to international bodies for their human rights practice. The problem the international organs face, however, is in executing these tasks effectively: in the face of resistance from a member state, the United Nations is all but immobilised. This is a problem discussed at length in the chapter on compliance, suffice to say at this stage that the failings of the United Nations in ensuring the effective implementation of assumed obligations can be attributed largely to the entrenched and defended rules of sovereignty and non-intervention.

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<sup>292</sup> *Ibid.* Pg. 577.

<sup>293</sup> Rehman, J. *Op. Cit.* Pg. 2.

Thus, while sovereignty has not precluded the formal adoption of treaties and acceptance of their universal ideals, one would argue that this cannot be taken as reliable evidence of sovereignty's downfall. In fact, it is in relation to the United Nations ability to ensure adherence to assumed standards, or conversely the extent to which universal human rights can reasonably be left to state implementation, that the universal ideology of the United Nations faces its most pressing challenge from sovereignty: the extent to which sovereignty has hampered the international supervision and enforcement of universal human rights is what has most significantly contributed to the inability to transform the ideological rhetoric into tangible reality around the globe.

Professor Bayefsky has concluded that today “it is undisputed that sovereignty is limited with regard to human rights”<sup>294</sup> as violations of human rights are a matter of concern for the international community, which cannot be justified on grounds of sovereignty. This is of course true: the international community must not sit back and accept violations of human rights merely because they occur within the territorial boundaries of another state. When it comes to it, however, it remains a delicate and often difficult task for the international community to police, which inevitably compromises the universality of human rights: human rights can never be regarded as truly universal if they are persistently violated by member states. The obligation of non-intervention in a nation's domestic affairs is still vehemently defended by states, which inevitably influences the course of action taken by the international community, with sometimes devastating consequences for the rights of individuals. Take the 1994 Rwandan genocide, for example. One does not need reminding of the atrocities committed in this case, but it is the fact that the United Nations failed to act to prevent the genocide, despite “the gathering signs of disaster”,<sup>295</sup> and failed to stop the killing once it had begun, which makes the tragedy all the more abhorrent. The devastating conflict, which ended up claiming the lives of more than eight hundred thousand men, women and children, was initially considered an internal matter; a matter which, by virtue of Article 2(7) of the Charter of the United Nations, was within the domestic jurisdiction of the

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<sup>294</sup> Bayefsky, A.F. *The UN Human Rights Treaty System: Universality at the Crossroads*. Op. Cit. Pg. 5.

<sup>295</sup> Annan, K.A. *Secretary-General's Message on the 10<sup>th</sup> Anniversary of the Genocide in Rwanda*. 7 April 2004. [online] <http://www.un.org/events/rwanda/sgmessage.html>. Accessed 29/05/2007.



Rwandan authorities and precluded international intervention. While the international community did eventually act, the fact that the genocide was ever allowed to happen is a matter of “bitter regret and abiding sorrow”.<sup>296</sup> It demonstrates, however, the deference afforded by member states to the sovereignty of their counterparts; deference ultimately at the expense of human rights. In situations such as this, the credibility of universal human rights takes a severe blow: the fact is, to the people of Rwanda and to many others the world over, so called human rights are not worth the paper they are written on when left in the hands of repressive regimes.

The continuing crisis in Darfur is yet another example of the total disregard for the values of human rights, in this case by the Sudanese Government, and the corresponding failure of the international community to act swiftly enough or forcefully enough. Here, sovereignty has consistently posed a massive hurdle to human rights: it has prevented the international community from getting aid in to assist those affected, and prevented the removal indicted individuals for trial at the International Criminal Court for war crimes, crimes against humanity and genocide. The conflict in Darfur erupted in 2003 between the Government of Sudan and allied Janjawid militia on the one side, and opposition forces the Sudanese Liberation Army and the Justice and Equality Movement on the other. Since then it has affected almost three million people: approximately three hundred thousand are believed to have died as a result of the conflict, and more than two and a half million have been internally displaced.<sup>297</sup> The human rights of civilians caught up in the conflict have been violated egregiously: the Government and allied militia “have been responsible for killings, torture, rape, detentions, forced displacement, the burning of homes and villages, and the theft and deliberate destruction of crops and cattle”.<sup>298</sup> Rebel forces have likewise inflicted grave human rights violations. Thus, the continuing crisis represents “one of the world's worst human rights and humanitarian catastrophes”.<sup>299</sup>

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<sup>296</sup> *Ibid.*

<sup>297</sup> Amnesty International. History of the Darfur Conflict. [online]  
URL:<http://www.amnestyusa.org/darfur/darfur-history/page.do?id=1351103>. Accessed 28/11/2008.

<sup>298</sup> *Ibid.*

<sup>299</sup> *Ibid.*

While the international community has tried to alleviate the crisis, efforts have been hampered by the sovereignty of Sudan. When the United Nations Security Council resolved to deploy a peacekeeping force to Sudan in 2007,<sup>300</sup> Secretary General Ban Ki-moon told the Security Council that “by authorizing the deployment of a hybrid operation for Darfur, you are sending a clear and powerful signal of your commitment to improve the lives of the people of the region, and close this tragic chapter in Sudan’s history”.<sup>301</sup> The Sudanese Government, however, refused to allow its implementation. As a result of Sudan's sovereignty, the United Nations has been rendered impotent, despite the perpetration of horrific human rights violations. Meanwhile, sovereignty has impeded the surrender of those indicted by the International Criminal Court for the crimes committed in Darfur. The International Court, in April 2007, acted to end impunity for Darfur by issuing arrest warrants for Janjaweed leader Ali Kushayb and Government Minister Ahmad Harun. Sudan, however, has refused to surrender the men. Not only do they remain free despite being indicted on fifty one counts of war crimes and crimes against humanity, Harun has been subsequently promoted to Minister for Humanitarian Affairs in Darfur, responsible for the welfare of those he stands accused of “persecuting, raping, attacking, and killing”.<sup>302</sup> In July 2008, the Chief Prosecutor submitted an application for the issuance of an arrest warrant for the Sudanese President, Omar al-Bashir, whom he believes has “masterminded” the crimes committed in Darfur and should therefore stand trial for Genocide, war crimes and crimes against humanity. The international community is trying: it is the first time the Security Council has referred a case to the International Criminal Court, and it is the first time the Court has moved against an acting head of state. But the International Court faces problems, principally in that it relies on member states to arrest and surrender suspects to the Court. Despite pressure from the United Nations, Sudan consistently refuses to implement the Criminal Courts warrants for arrest.<sup>303</sup> When the state refuses to act, the Court is powerless. The tragedy of Darfur, coming so soon after

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<sup>300</sup> Security Council Resolution 1769 (2007) of 31 July 2007. UN Doc. S/RES/1769(2007).

<sup>301</sup> Press Release. *Secretary-General Urges All Parties To Remain Engaged, As Security Council Authorizes Deployment Of United Nations-African Union Mission In Sudan*. UN Doc. SG/SM/11110, SC/9090, AFR/1565. 31/07/2007. [online] URL: <http://www.un.org/News/Press/docs/2007/sgsm11110.doc.htm>. Accessed 01/08/2007.

<sup>302</sup> Amnesty International. Sudan: “Justice for Darfur” Campaign. AI Index. AFR 54/018/2008.

<sup>303</sup> Amnesty International. International Criminal Court in difficulty ten years after the Rome Statute. 17 July 2008. [online] URL: <http://www.amnestyusa.org>. Accessed 28/11/2008.

the Rwandan genocide, is a graphic reminder that universal human rights are fighting a losing battle in the face of state practice which egregiously violates these rights with impunity.

In consequence of the increasing prominence of human rights it has been remarked that “in international law, the sovereign has finally been dethroned”,<sup>304</sup> yet it would be naïve to assume that a prominent human rights rhetoric has substantially eroded the sovereignty of states. While the ideology of universal human rights seems to leave no room for absolute state sovereignty, the reality is that the theory is often forced to give way to the reality of international relations. Certainly, it is “somewhat premature”<sup>305</sup> to announce the end of state sovereignty just yet. More than sixty years after the United Nations was created to promote and protect human rights, state sovereignty remains a significant obstacle to the recognition and implementation of universal human rights, as demonstrated so devastatingly by crises such as Rwanda and Darfur. While the optimist may argue that human rights have banished state sovereignty “to the shelves of history as a relic from an earlier era”,<sup>306</sup> the realist must surely conclude that state sovereignty still reigns supreme, hampering the chances of ever achieving truly universal rights.

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<sup>304</sup> Reisman, W.M. Sovereignty and Human Rights in Contemporary International Law. *American Journal of International Law*. 1990. Vol. 84. Pg. 866 at 868.

<sup>305</sup> Jacobsen, M and Lawson, S. Between Globalization and Localization: A Case Study of Human Rights Versus State Sovereignty. *Op. Cit.* PP. 203-330.

<sup>306</sup> Henkin, L. *International Law: Politics and Values*. Martinus Nijhoff Publishers. Dordrecht. 1995. Pg. 10.

## 5 RESERVATIONS TO INTERNATIONAL HUMAN RIGHTS TREATIES

State sovereignty is also significant when one considers the reservations regime applicable to international human rights. As we shall see, reservations add further weight to the ever tightening noose around the neck of universal human rights, severely constricting the potential of international human rights treaties. The following discussion will demonstrate that reservations have the potential to significantly reduce the impact of human rights treaties, by enabling member states to effectively cherry pick the norms by which they are bound. In fact, taken to the extreme, reservations may allow a state to formally ratify a particular treaty or treaties without ever making a genuine commitment to its terms. Reservations, it would seem, are inherently contradictory to universal human rights. While their existence may facilitate the ratification of treaties by large numbers of states, their operation results in an insurmountable obstacle to truly universal human rights. Universal ratification through reservations comes at the expense of universal human rights protection and promotion. Thus, it is fair to say that the issue of reservations to multilateral treaties “has been [and continues to be] one of the most controversial subjects of contemporary international law”.<sup>307</sup>

The previous chapters demonstrated the importance of both state sovereignty and cultural sensitivity to member states. It is an elementary principle of international law that a state cannot be held to account for anything it has not expressly accepted. State consent is absolute. The difficulty which must be overcome, therefore, is how to accommodate respect for state sovereignty and cultural difference while still ensuring states sign up to international human rights treaties. In bridging the gap between these competing premises, reservations may be seen as “a necessary evil”.<sup>308</sup>

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<sup>307</sup> Sinclair, I. *The Vienna Convention on the Law of Treaties*. Manchester University Press. Manchester. 1984. 2<sup>nd</sup> Edition. Pg. 77.

<sup>308</sup> Marks, S. *Three Regional Human Rights Treaties and Their Experience of Reservations*. In Gardiner, J.P (ed). *Human Rights as General Norms and a State's Right to Opt Out: Reservations and Objections to Human Rights Conventions*. 1997. Pg. 35.

In any system of international law reservations are, indeed, a necessary part of the landscape: they inject an element of vital flexibility into otherwise rigid international treaties. And while their effect may be detrimental to universal human rights, they are nonetheless a fact of international law; another example of why the reality does not match the rhetoric of universalism. The ability to enter reservations to the provisions of a treaty is a powerful tool in encouraging states to submit to their terms, in light of the importance attached to state sovereignty and cultural relativism. Goodman succinctly sums this up, stating that “reservations are essential to obtaining the universal ratification of treaties. That is, without the ability to enter a reservation, many states would be unwilling to assent to all terms of a particular treaty and thus would never submit to ratification”.<sup>309</sup> This is certainly true: in order to secure widespread participation “international human rights treaties have been adopted with built-in flexibility to accommodate national variations in respect of those treaties”.<sup>310</sup> Without this flexibility it is doubtful whether ratification statistics would look so promising. The correlation between ratification and reservations is supported by compelling evidence from the treaties themselves, and is demonstrated precisely by state practice with regard to two particular treaties: the Convention on the Rights of the Child and the Convention on the Elimination of Discrimination against Women. The unique position of the Children’s Convention, as the most ratified treaty, has already been examined in chapter two. The Convention eliminating discrimination against women is not lagging far behind, having been ratified by over ninety percent of member states.<sup>311</sup> In terms of the universality of rights such statistics are encouraging as they appear to indicate that it is possible to elaborate legal binding norms on which there is general consensus and which have been accepted by the wider international community.<sup>312</sup> Yet isolated statistics such as these mask the fact that these are also the two most heavily reserved

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<sup>309</sup> Goodman, R. Human Rights Treaties, Invalid Reservations and State Consent. *The American Journal of International Law*. 2002. Vol. 96, No 3. Pg 531 at 537.

<sup>310</sup> Tyagi, Y.K [2003(a)]. *Reservations to Human Rights Treaties: a Means of Promoting Cultural Relativism?* Paper presented at the International Symposium held by the Japanese Society of International Law (JSIL) on 11-12 October 2003, at Nagoya, Japan. [online] URL: [http://www.soc.nii.ac.jp/jsil/annual\\_documents/2003/autumn/houkoku-abstr/Panel%20A2%20Tyagi%20paper.pdf](http://www.soc.nii.ac.jp/jsil/annual_documents/2003/autumn/houkoku-abstr/Panel%20A2%20Tyagi%20paper.pdf) Accessed 18/01/2007.

<sup>311</sup> Figures available online at <http://www.ohchr.org/english/>. Accessed 01/08/2006.

<sup>312</sup> International Law Association. *International Law Association Report on the Treaty System*. Op. Cit.

treaties.<sup>313</sup> Reservations cut across the geographical and political spectrum: they are not limited to a particular type of reservations entered by a particular type of member, and are often broadly formulated and therefore wide ranging. For example, Saudi Arabia has entered a reservation to the Convention on the Rights of the Child “with respect to all such articles as are in conflict with the provisions of Islamic law”.<sup>314</sup>

But why would one claim that reservations are evil? The answer lies in the effect that is occasioned by allowing such flexibility. Reservations inject flexibility into the treaty system by effectively deferring to state sovereignty. Reservations are the ultimate refuge of state consent, allowing a state to stipulate its own conditions to ratification of the treaty. In essence, reservations allow a state to sign up to the standards dictated in an international treaty while simultaneously protecting its right to exclusively determine how it treats its own citizens, by permitting the state to formally stipulate what article or articles it is or is not willing to be bound by.<sup>315</sup> A reservation is a “unilateral statement...made by a state...whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State”,<sup>316</sup> according to Article 2(1)(d) of the Vienna Convention on the Law of Treaties. In determining whether a statement should be considered a reservation the European Court has previously stated that “one must...seek to determine [its] substantive content”.<sup>317</sup> That is, the intention underlying the formulation of the statement, and the result effected by it, will determine whether it should rightly be considered a reservation. A reservation therefore effectively replaces a treaty norm dictated by the international community with another norm dictated by the individual state: it acts to either exclude the right entirely and allow the reserving state absolute freedom with regard to the reserved provision, or it restricts the right thereby limiting the reserving states obligations under the treaty,

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<sup>313</sup> See Chapter IV.8 and IV.11. Status of Multilateral Treaties Deposited with the Secretary General. United Nations Treaty Collection. [online] URL: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/chapterIV.asp>. Accessed 21/07/2007.

<sup>314</sup> Chapter IV.11 Status of Multilateral Treaties Deposited with the Secretary General. United Nations Treaty Collection. [online] URL: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty19.asp>. Accessed 21/07/2007.

<sup>315</sup> Goodman, R. *Op. Cit.* Pg 531 at 536; and Smith, R.K.M. *Op. Cit.* Pg. 176.

<sup>316</sup> Article 2(1)(d). Vienna Convention on the Law of Treaties 1969.

<sup>317</sup> *Belilos v Switzerland*. Judgement of 29 April 1988. Application No. 10328/83. Series A, No. 132. § 49

increasing its permitted freedom of action.<sup>318</sup> Thus, reservations allow a state to ingratiate itself with the international community by taking the commendable step of ratifying a particular human rights treaty, without actually having to relinquish any sovereignty it does not want to.<sup>319</sup> A state can therefore be seen to be complying with international human rights law without actually accepting anything other than that with which it expressly agrees.<sup>320</sup>

It is clear that reservations fundamentally undermine the ideology of universal human rights: a legally binding statement which has the effect of “exonerating a state from liability under a particular part of a treaty”<sup>321</sup> poses significant implications for the integrity of international human rights treaty norms. The legal effect of a reservation therefore severely impairs the universality of international human rights norms and diminishes the scope of protection afforded by the treaty<sup>322</sup>: with every reservation entered, the United Nations moves ever further from transforming the rhetoric of universalism from a utopian dream to a tangible reality. With each state free to effectively determine its own human rights treaty through the entry of reservations, states will be bound by unique, rather than universal, treaty obligations. Critics of the traditional, liberal approach to reservations argue that the quest to secure universal ratification at all costs has caused the steady erosion of the integrity of international human rights treaties.<sup>323</sup> One would argue that reservations, despite superficially appearing to take the United Nations closer to universal ratification, negate the true universality of treaty norms: as Cameron and Horn argue, “the rights guaranteed...should be seen as a unity, thus a significant reservation to one article weakens not simply that right but the totality of rights enjoyed by individuals in the reserving state”.<sup>324</sup> Thus, universal ratification does not equate to universal acceptance when states are effectively allowed to pick and choose what standards they are willing to

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<sup>318</sup> Cameron, I and Horn, F. Reservations to the European Convention on Human Rights: The Belilos Case. *German Yearbook of International Law*. 1990. Vol. 33. Pg. 69 at 90.

<sup>319</sup> Goodman, R. *Op. Cit.* Pg 531 at 536.

<sup>320</sup> Smith, R.K.M [2007]. *Op. Cit.* Pg. 176.

<sup>321</sup> Smith, R.K.M [2005]. *Textbook on International Human Rights*. Oxford University Press. 2<sup>nd</sup> Edition. 2005. Pg. 176.

<sup>322</sup> Korkelia, K. New Challenges to the Regime of Reservations under the International Covenant on Civil and Political Rights. *European Journal of International Law*. 2002. Vol. 13, No. 2. Pg. 437 at 448.

<sup>323</sup> Goodman, R. *Op. Cit.* Pg 531 at 534.

<sup>324</sup> Cameron, I and Horn, F. *Op. Cit.* Pg. 69 at 98.

adhere to.

Recognising the damage reservations do to the universality of human rights, the United Nations has raised concerns over the number and breadth of reservations made upon ratification.<sup>325</sup> However, the efforts of the United Nations to condemn reservations have, unsurprisingly, had little effect and few reservations made upon ratification are subsequently withdrawn.<sup>326</sup> This is evidenced by Australia's reservation to Article 4(a) of the Convention on the Elimination of Racial Discrimination, which the supervisory Committee has drawn attention to in each of its last three concluding observations. In 1994, the Committee recommended that “the State party adopt appropriate legislation with a view to withdrawing its reservation to article 4(a) of the Convention”,<sup>327</sup> reiterated this again in 2000,<sup>328</sup> and in 2005 noted that the reservation had still not been removed.<sup>329</sup> Although disappointing, this is hardly surprising: the incentives for maintaining the reservation are somewhat greater than the costs of doing so. There is therefore little incentive to remove a reservation, particularly when one considers the legal effect of reservations.

## 5.1 The Effect of Reservations

When a state conditions its ratification by entering a statement which purports to limit its obligations under the treaty, what is its effect on treaty relations between the reserving state and other states? In order to fully assess the impact of reservations upon the United Nations goal of universal human rights, one must consider the implications of a reservation on not only the reserving state, but also on all other state parties.

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<sup>325</sup> Report of the Sixth Meeting of Persons Chairing the Human Rights Treaty Bodies. *Human Rights Questions: Implementation of Human Rights Instruments*. UN Doc A/50/505. 4 October 1995. § 17.

<sup>326</sup> Report of the United Nations High Commissioner for Human Rights. *Comprehensive Implementation of and Follow-up to the Vienna Declaration and Programme of Action*. *Op. Cit.* § 14.

<sup>327</sup> Committee on the Elimination of Racial Discrimination. *Consideration of reports, comments and information submitted by states parties under article 9 of the convention*. Concluding Observations: Australia. UN Doc. A/49/18. 6 Jan 1995. § 549.

<sup>328</sup> Committee on the Elimination of Racial Discrimination. *Consideration of reports submitted by states parties under article 9 of the convention: Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*. UN Doc. CERD/C/304/Add.101. 19 April 2000. § 14.

<sup>329</sup> Committee on the Elimination of Racial Discrimination. *Consideration of reports submitted by states parties under article 9 of the convention: Concluding observations of the Committee on the Elimination of Racial Discrimination: Australia*. UN Doc. CERD/C/AUS/CO/14. 14 April 2005. § 12.



Traditionally, with multilateral treaties, a reservation would only be deemed effective if it was unanimously accepted by all other state parties to the treaty. However, the requirement for unanimous acceptance becomes increasingly problematic as the number of states that are party to the treaty rises: with as many as 192 state parties, it is almost inconceivable that there would be unanimous agreement over a reservation to an international human rights treaty. So what is the alternative?

Prior to the landmark opinion of the International Court of Justice in the Genocide Convention case, the unanimity rule outlined above was utilised to determine whether a reservation to a multilateral treaty was considered effective. Given the problematic nature of this rule, the question was brought before the International Court of Justice in relation to the Convention on the Prevention and Punishment of the Crime of Genocide, when it was asked to determine whether a state that had entered a reservation to the treaty could still be considered party to the treaty if the reservation was objected to by one or more states. In delivering its advisory opinion, the majority of the Court declared that if universal participation was what was strived for, it would be inconceivable to exclude a state from treaty relations on the basis that another state had objected to its reservation.<sup>330</sup> They added the proviso, however, that this should be the case only if the reservation was to a minor provision of the treaty. If the reservation impairs the object and purpose of the treaty, the outcome must be quite different, as explained below. Thus, the Court conclusively stated that in some cases it would be possible for a state to be considered a party to a multilateral treaty notwithstanding that certain member states objected to its reservation. In terms of universal participation, this is surely a positive outcome. Yet in terms of universal human rights, it is not necessarily such a straightforward conclusion.

Following the Genocide Convention case, a state is free to either accept or object to a reservation entered by another member. The rules which govern this area are now laid down in the Vienna Convention on the Law of Treaties, which was drafted in light of the Genocide Convention case and incorporates many of the opinions expressed by the

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<sup>330</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. Advisory Opinion. [1951] ICJ Reps 15 at 21/22.

Court. By virtue of Article 20(4) of the Vienna Convention, acceptance of a reservation renders the reserving state a party to the treaty in relation to the state which has accepted its reservation. Acceptance of reservations, despite their detrimental effect, is the most common outcome. This is largely as a result of the operation of tacit consent, the importance of which is increased when one considers that the lack of reciprocity in international human rights generally results in few objections. Tacit consent, outlined in Article 20(5) of the Convention, means that if a state has not voiced any objection to the reservation within twelve months, it is deemed to have been accepted by that state. According to Article 21(1), a reservation which has been accepted has the legal effect of modifying the provisions of the treaty to which the reservation relates. Thus, a reserving state is removed from its obligations to the extent of the reservation, and cannot, therefore, be held to account over the reserved provision. Moreover, although a reservation is a unilateral statement, this does not mean that it is the reserving state alone that will be removed from its obligations under the reserved treaty provision. While reciprocity generally plays little part in international human rights law, in that human rights treaties do not confer mutual benefits upon state parties, it plays an important role in relation to reservations. Clearly, if a state has been removed from its obligations under a treaty by virtue of its reservation, it can neither be held to account nor can it hold any other state to account in relation to those provisions. The treaty is accordingly modified for both the reserving state and any other member state that accepts the reservation, vis-a-vis each other. Such a modification of the treaty fundamentally negates the universality of human rights: with every reservation accepted – either expressly or tacitly – the treaty is fragmented and the universality of rights infringed. Each reservation therefore compromises the universal ideology of international human rights.

States are, of course, always free to object to a reservation should they be so inclined, under Article 20(4)(b) of the Vienna Convention. If such a course is taken, it is potentially devastating for international human rights protection as the objecting state is entitled to preclude the entry into force of the particular treaty, in its entirety, between the two states consequent to its objection. Clearly, in a system where universal standards applicable to all peoples are required, preventing treaty relations between states seems

catastrophic. Fortunately, this is not the usual outcome of an objection. Article 20(4)(b) specifically indicates that unless the objecting state definitely expresses a contrary intention, the treaty will nonetheless enter into force between the parties, on the proviso that the provisions to which the reservation relates will not apply, to the extent of the reservation.<sup>331</sup> Indeed, this is usually the preferred option for objecting states. For example, when Saudi Arabia ratified the Convention on the Elimination of Racial Discrimination a reservation was entered to the effect that “[The Government of Saudi Arabia declares that it will] implement the provisions [of the above Convention], providing these do not conflict with the precepts of the Islamic Sharia’h”.<sup>332</sup> Of the states that took the time to object to this reservation, most nevertheless expressly stated that their objection would not constitute an obstacle to the entry into force of the Convention between the parties.<sup>333</sup> Thankfully, it seems that those states which carefully scrutinise the reservations entered by their counterparts are more inclined to endorse treaty relations than prevent them. In the interests of universal human rights, this is to be welcomed: better to have a state party to a somewhat diminished treaty than be cast aside altogether. Unfortunately, however, this is less than ideal, as while it is more preferable than preventing treaty relations in their entirety, irreparable damage has already been done to the universality of rights by the entry of the reservation.

Moreover, the number of states that actually take the time to raise their disapproval of a fellow members reservation is disappointingly low. Reaction to reservations entered by both Iran and the United Arab Emirates is a clear example of the situation. The United Arab Emirates entered a reservation to the Convention on the Elimination of Discrimination against Women to the effect that it did not consider itself bound by Article 2(f) which requires states to “take all appropriate measures, including legislation,

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<sup>331</sup> Article 21(3). Vienna Convention on the Law of Treaties 1969. For example, Finland objected to Saudi Arabia’s reservation to CERD but was silent as to the effect of the objection. Consequently, the convention entered into force between the two countries.

<sup>332</sup> Chapter IV.2. Status of Multilateral Treaties Deposited with the Secretary General. United Nations Treaty Collection. [online] URL: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty2.asp>. Accessed 21/07/2007.

<sup>333</sup> Chapter IV.2. Status of Multilateral Treaties Deposited with the Secretary General. United Nations Treaty Collection. [online] URL: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty2.asp>. Accessed 21/07/2007.

to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women”.<sup>334</sup> Only thirteen states felt compelled to raise their concerns over this reservation. The reaction to Iran’s reservation to the Convention on the Rights of the Child which, lest we forget, has achieved virtual universal participation, is similarly disappointing: only nine states felt compelled to object to its exceptionally wide reservations – made on both signature and ratification – that it would not apply provisions of the Convention which were incompatible with Islamic laws.<sup>335</sup> This is less than five percent of state parties. Given that there is a very slim likelihood a fellow member will voice criticism of a reservation, it is fair to assume that a reserving state would find little material disadvantage to be suffered by entering a wide, general reservation to any of the human rights treaties. If universal human rights are indeed the ultimate goal of the United Nations, this is an unfortunate situation: states need to police the reservations of their counterparts much more tenaciously, given it is they who hold sole responsibility for their scrutiny.

One must therefore ask: why is it that are states so remiss<sup>336</sup> in protecting the integrity of human rights treaties? The answer would appear to be grounded in self-interest. Firstly, the lack of reciprocity international human rights plays a major part. In public international law, reciprocity is the guiding force which motivates a state to react to the reservations of another state. However, as already highlighted, the general rules of reciprocity do not apply to international human rights treaties, which do not purport to confer mutual benefits and obligations upon state parties. The International Court of Justice confirmed that reciprocity does not apply to human rights treaties, stating that “the contracting parties do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d’être* of the Convention”.<sup>337</sup> This sentiment was reiterated by the Human

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<sup>334</sup> Article 2(f). Convention on the Elimination of All Forms of Discrimination against Women.

<sup>335</sup> Chapter IV.11. Status of Multilateral Treaties Deposited with the Secretary General. [online] URL: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty19.asp>. Accessed 21/07/2007.

<sup>336</sup> v Boven, T. Foreword to Lijnzaad, L. *Reservations to UN-Human Rights Treaties: Ratify and Ruin?* Martinus Nijhoff Publishers. Dordrecht. 1995. Pg. v-vi.

<sup>337</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. Advisory Opinion. *Op. Cit.* 15 at 23. See also, Effect of Reservations on the Entry into Force of the American Convention on Human Rights. Advisory Opinion. OC-2/82 24 September 1982. Inter-Am. Ct. H.R. (Ser. A)

Rights Committee in General Comment 24 which categorically stated that “inter-state reciprocity has no place [in relation to human rights treaties as these treaties do not represent] a web of inter-state exchanges of mutual obligations [but rather they] concern the endowment of individuals with rights”.<sup>338</sup> Thus, a state will not be released from its own human rights obligations simply by virtue of its objection to a reservation.<sup>339</sup> The lack of reciprocity therefore means that states often see little legal interest or benefit in objecting to reservations. Secondly, states are also wary of openly criticising one of their own. Good relations are not to be jeopardised lightly, and states are therefore reticent about proclaiming judgement on the stance of other members for fear that it may adversely affect a delicate political balance. Thus, “in the interests of mutual solidarity”<sup>340</sup> states are generally disinclined to criticise others.

The upshot of either accepting or objecting to a reservation is, in effect, the same: a move away from securing universal human rights as a practical reality. Reservations essentially break down a supposedly universal multilateral treaty into a series of bilateral agreements between states. The net result is that the treaty itself often turns out to be little more than a “moth-eaten guarantee”,<sup>341</sup> rather than a proclamation of universal, indivisible and interrelated rights,<sup>342</sup> with states owing different obligations to different states.<sup>343</sup> Reservations therefore seriously undermine the United Nations claims about the universality, interdependence and interrelatedness of human rights as they allow states to opt out of particular obligations and effectively pick and choose what obligations they are willing to assume.<sup>344</sup> If states are essentially free to cherry pick the treaty norms they are willing to accept, human rights are, in effect, reduced to privileges which the state affords to its citizens rather than the inherent rights of all peoples.

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No. 2. (1982) § 29-33.

<sup>338</sup> Human Rights Committee. *General Comment No 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*. UN Doc. CCPR/C/21/Rev.1/Add.6. 4 November 1994. § 17.

<sup>339</sup> Lijnzaad, L. *Op. Cit.* Pg. 48 and 54

<sup>340</sup> Cameron, I and Horn, F. *Op. Cit.* Pg. 69 at 93.

<sup>341</sup> Lijnzaad, L. *Op. Cit.* Pg. 3.

<sup>342</sup> Part I § 5. Vienna Declaration and Programme of Action.

<sup>343</sup> Craven, M. Legal Differentiation and the Concept of the Human Rights Treaty in International Law. *European Journal of International Law*. 2000. Vol. 11, No 3. Pg. 489 at 495/6.

<sup>344</sup> Neumayer, E. *Qualified ratification: explaining reservations to international human rights treaties*. July 2006. Pg 3 and 10. [online] URL: <http://www.lse.ac.uk/collections/geographyAndEnvironment/whosWho/profiles/neumayer/pdf/Humanrightsreservationsarticle.pdf>. Accessed 13/07/2006.

## 5.2 Determining Admissibility: The Object and Purpose Test

In light of the potentially damaging nature of reservations, it is imperative the United Nations have some mechanism of limiting their scope, thereby curtailing – or at least stemming – the damage done to universality. This is where the object and purpose test comes into play. The object and purpose test seeks to regulate the reservations regime by prohibiting the entry and operation of impermissible reservations. This rule was first identified in the aforementioned Genocide Convention case, when it was declared that while states should be permitted to enter a minor reservation without foregoing their membership of the treaty, they should not be permitted to enter reservations which fundamentally impair the *raison d'être* of the treaty.<sup>345</sup> There are therefore limits as to how far states can go in entering reservations to international treaty provisions: they should not be permitted to enter reservations which seriously compromise the integrity of the treaty.

While those who strive for truly universal human rights should welcome any measure which attempts to curtail the reach of reservations, the object and purpose test is perhaps not the most effective tool to ensure this. Rather, it is fraught with difficulty. While the International Court may have envisioned the object and purpose test as a sensible and straightforward safeguard designed to protect treaty integrity, when applied to multi-faceted human rights treaties it is more likely to be prohibitively complex. Difficulties arise almost immediately one tries to determine the object and purpose of lengthy, multi-faceted human rights treaties which have provisions of equal, as opposed to hierarchical, status.<sup>346</sup> The dissenting opinion in the Genocide Convention case contemplated as much, when it was insightfully argued that a decision on the object and purpose of a treaty would inevitably involve detailed scrutiny of its actual provisions.<sup>347</sup>

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<sup>345</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. Advisory Opinion. *Op. Cit.* 15 at 21.

<sup>346</sup> Report of the Human Rights Committee. *Annex VI: Observations by the United Kingdom of Great Britain and Northern Ireland on General Comment No. 24 (52), on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant.* UN Doc. A/50/40. Vol. I. 3 October 1995. § 6.

<sup>347</sup> Dissenting Opinion of Judges Guerrero, Sir Arnold McNair, Read and Hsu Mo to the Advisory Opinion

According to the United States of America, “an ‘object and purpose’ analysis by its nature requires consideration of the particular treaty, right, and reservation in question”<sup>348</sup> as it is not possible to make any absolute statements as to the type of reservation which would always be regarded as contrary to the object and purpose of the treaty. In short, there are no hard and fast rules when it comes to the object and purpose test: there is no simple formula which can be relied upon to determine whether a reservation conforms with or contravenes the rule, as was argued by the Human Rights Committee in its General Comment 24.

Such uncertainty therefore begs the question: who is responsible for determining impermissibility? Given what is at stake, it is hardly surprising that the Human Rights Committee has laid its claim as the appropriate body for the job.<sup>349</sup> Bearing in mind the very nature of the international supervisory organs and the task with which they are entrusted, such a solution would indeed be a positive one. The supervisory organs, composed of independent experts, are entrusted with ensuring the effective implementation of their respective treaties.<sup>350</sup> Surely, if any body could be trusted to reach a reasoned, impartial decision on the permissibility of a reservation it would be these treaty monitoring bodies. Moreover, this is precisely the type of consideration the committees must engage in to perform their role as monitoring body effectively.<sup>351</sup> In terms of furthering the universality of human rights, allowing the treaty monitoring bodies to preside over the compatibility of reservations with the object and purpose of the treaty should be endorsed as a welcome one.

Unsurprisingly, this assertion has been strongly contested by states themselves. The United Kingdom argues that, while the Committees may necessarily hold a view as to

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on the Prevention and Punishment of the Crime of Genocide. [1951] ICJ Reps 15 at 44.

<sup>348</sup> Report of the Human Rights Committee. *Annex VI: Observations by the United States of America on General Comment No. 24 (52), on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant*. UN Doc. A/50/40. Vol. I. 3 October 1995. § 2.

<sup>349</sup> Human Rights Committee. *General Comment No 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*. UN Doc. CCPR/C/21/Rev.1/Add.6. 4 November 1994.

<sup>350</sup> See Cameron, I and Horn, F. *Op. Cit.* Pg. 69 at 87-96.

<sup>351</sup> Human Rights Committee. *General Comment No 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*. UN Doc. CCPR/C/21/Rev.1/Add.6. 4 November 1994. § 18.

the status of a reservation, that view cannot be deemed “determinative”.<sup>352</sup> While the Committees view may assist other member states in their consideration of a reservation, it is the member state alone who must have the final word its legitimacy. The United States flatly rejected the possibility of transferring power to the treaty monitoring bodies in this regard, simply noting that “the Committee’s position, while interesting, runs contrary to the Covenant scheme and international law”.<sup>353</sup> Clearly, there is no intention of handing over any power to the supra national treaty bodies. Ultimately, as with so much in international human rights, there is little chance of overcoming the will of member states. Thus, as demanded, it is member states themselves that are responsible for monitoring reservations, drawing attention to those which impair the object and purpose of a treaty as and when required. This, of course, does not always happen; it has already been established that a lack of reciprocity results in a lax attitude towards the reservations of counterparts, which extends to those which are flatly contradictory of the treaties fundamental objectives. By letting impermissible reservations go unnoticed, it is the realisation and advancement of universal human rights that suffers.

### 5.3 The Problem of Impermissible Reservations

The object and purpose test, in spite of its shortcomings, clearly attempts to prevent states from jeopardising the *raison d’être* of treaties. Unfortunately, the mere existence of the rule does little to ensure it is respected by states: many reservations that appear to contradict a treaty’s object and purpose are nevertheless entered. The question thus arises: what happens if a state does enter an impermissible reservation? What is its legal effect? This is an ambiguous and contentious area, and the Vienna Convention is silent on the matter. Articles 20 and 21 of the Convention outline the rules regulating the acceptance of or objection to permissible reservations, yet nowhere does it stipulate any

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<sup>352</sup> The Committee express the view, at § 18 of General Comment Number 24 that “It necessarily falls to the Committee to *determine* whether a reservation is compatible with the object and purpose of the Covenant.” Human Rights Committee. *General Comment No 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*. UN Doc. CCPR/C/21/Rev.1/Add.6. 4 November 1994.

<sup>353</sup> Report of the Human Rights Committee. *Annex VI: Observations by the United States of America on General Comment No. 24 (52), on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant*. UN Doc. A/50/40. Vol. I. 3 October 1995. § 1.



rules relating to impermissible reservations. Does this mean that Articles 20 and 21 apply equally to impermissible reservations? One would argue not, as such a conclusion would entirely negate the very notion of an impermissible reservation: states cannot be free to accept those reservations which fall foul of the Article 19 criteria: to reach any other conclusion would be tantamount to telling states that even if they formulate a reservation which flatly contradicts the most fundamental principles of the treaty, they will nevertheless be entitled to benefit from it in its entirety, quite irrespective of the fact that it is invalid and not permitted under international law.<sup>354</sup>

What, then, is the most appropriate course of action in the case of illegal reservations? The answer seems to be a moot point, with very contrasting implications for the universality of rights. While the Vienna Convention is mute on the issue, the Genocide Convention case which preceded its drafting dealt with it directly. According to the International Court, states may accept compatible – or minor – reservations; reservations deemed impermissible however, are not capable of acceptance. Rather, any state that enters an incompatible reservation simply “cannot be regarded as being a party to the convention”.<sup>355</sup> The traditional approach to tackling invalid reservations is therefore to negate the act of ratification: to remove the reserving state from treaty relations entirely. This appears to be based on the inviolable principle of state consent, expressly recognised by the International Court when it commented that “in treaty relations, a state cannot be bound without its consent”.<sup>356</sup> Thus, a state which does not consent to the provisions of a treaty – evidenced by a failure to ratify the relevant instrument – is simply not bound by that treaty. Similarly, a state which assigns limits on its consent to be bound by expressly entering (permissible) reservations to treaty provisions cannot be regarded as having consented to being bound by those reserved provisions. Therefore, says the United Kingdom, “a State which purports to ratify a human rights treaty subject to a reservation which is fundamentally incompatible with participation in the treaty regime cannot be regarded as having become a party at

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<sup>354</sup> Goodman, R. *Op. Cit.* Pg. 531 at 535.

<sup>355</sup> Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide. Advisory Opinion. *Op. Cit.* 15 at 29.

<sup>356</sup> *Ibid.* 15 at 21.

all...”.<sup>357</sup>

Reservations are therefore generally deemed to be integral to a states consent to be bound by a treaty. The United States has explicitly confirmed that its reservations entered upon ratification of the International Covenant on Civil and Political Rights constitute an essential element of its consent to be bound by the Covenant. Should any of these reservations be deemed invalid, the United States has adamantly asserted that the ratification as a whole should be considered annulled.<sup>358</sup> Marks recognises this position when she argues that a state which has qualified its consent to be bound by entering a reservation fundamentally at odds with the object and purpose of the treaty is unlikely to have intended its act of ratification to prevail over its intention to enter the invalid reservation.<sup>359</sup> Indeed, as Bowett notes, when a state enters a reservation which is totally incompatible with the object and purpose of the convention, the reservation should be presumed to invalidate the states acceptance as the will to become a member is, in all likelihood, outweighed by its will to condition its acceptance by way of the impermissible reservation.<sup>360</sup> The reservation entered by Saudi Arabia to the Convention on the Rights of the Child is a case in point: although widely considered to be contrary to the object and purpose of the treaty, it is difficult to conceive that Saudi Arabia does not consider it as essential to its consent to be bound. This is reinforced by examining the reservations entered to the further three treaties it has ratified; both the Convention on the Elimination of Discrimination Against Women<sup>361</sup> and the International Convention on the Elimination of Racial Discrimination<sup>362</sup> are reserved to the extent

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<sup>357</sup> Report of the Human Rights Committee. *Annex VI: Observations by the United Kingdom of Great Britain and Northern Ireland on General Comment No. 24 (52), on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant*. UN Doc. A/50/40. Vol. I. 3 October 1995. § 15.

<sup>358</sup> Report of the Human Rights Committee. *Annex VI: Observations by the United States of America on General Comment No. 24 (52), on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant*. UN Doc. A/50/40. Vol. I. 3 October 1995. § 5.

<sup>359</sup> Marks, S. Reservations Unhinged: The Belilos Case Before the European Court of Human Rights. *International and Comparative Law Quarterly*. 1990. Vol. 39. Pg. 300 at 313.

<sup>360</sup> Bowett, D.W. Reservations to non restricted multilateral treaties. *British Yearbook of International Law*. 1976/77. Vol. 48. Pg. 67 at 84.

<sup>361</sup> Chapter IV.8. Status of Multilateral Treaties Deposited with the Secretary General. [online] URL: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty10.asp>. Accessed 21/07/2007.

<sup>362</sup> Chapter IV.2. Status of Multilateral Treaties Deposited with the Secretary General. [online] URL: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty2.asp>. Accessed

that they will not apply if they are in conflict with the precepts of Islamic Shari'a. Only the Convention against Torture does not contain a similar statement. If Saudi Arabia considers these reservations essential to its consent to be bound by the treaty, in line with general international law Saudi Arabia should no longer be considered a party to the relevant treaty(s) at all.

#### 5.4 Severance and its Merits

Bearing in mind the supposed universality of rights however, and the United Nations continued push to secure this, perhaps the traditional approach is not the most beneficial in the realm of international human rights. The Human Rights Committee has certainly argued that as human rights treaties are a special type of international instrument – penetrating the state veil and proclaiming rights which must be “ensured to all those under a states party's jurisdiction”<sup>363</sup> – the “classic rules on reservations [are] inadequate”.<sup>364</sup> Academics have likewise argued that the traditional rules should be cast aside in favour of a solution which is more preferential to the advancement of universal human rights. Traditional rules on reservations are, after all, very state centric in light of the fact that the only actors in traditional international law have been nations themselves. Not so with human rights, and thus the “individualist and contractualist”<sup>365</sup> approach which typifies the regulation of reservations is arguably entirely inappropriate in this regard. Thus, there has been a move towards severing impermissible reservations: considering them to be legally null and void.<sup>366</sup> The most significant contribution to this debate is General Comment 24, issued by the Human Rights Committee, which is responsible for overseeing the International Covenant on Civil and Political Rights. In what appears to be a rather innocuous statement nestled in the depths of the General Comment the Committee declares that “[t]he normal consequence of an unacceptable reservation is not that the Covenant will not be in effect at all for a reserving party. Rather, such a reservation will generally be severable, in the sense that the Covenant will

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21/07/2007.

<sup>363</sup> Cameron, I and Horn, F. *Op. Cit.*

<sup>364</sup> *Ibid.*

<sup>365</sup> Trindade, A.A.C. The Interdependence of Human Rights – Obstacles and Challenges to Their Implementation. *International Social Science Journal*. 1998. Vol. 50, Issue. 158. Pg. 513 at 516.

<sup>366</sup> Bowett, D.W. *Op. Cit.* Pg. 67 at 82-84.

be operative for the reserving party without the benefit of the reservation”.<sup>367</sup>

Unsurprisingly, the Human Rights Committee appears anxious to move away from the potential of invalid reservations negating a states acceptance of the treaty in its entirety: it is better to have a state party to the treaty and subject to international scrutiny, than excluded and beyond the reach of the international community. Moreover, the traditional approach severely compromises the universality of human rights norms as it purports to remove a state from the treaty regime in its entirety, and citizens of that state will be deprived of rights (albeit perhaps limited rights) that they previously enjoyed. This is particularly true for monist states such as the Netherlands, which guarantee treaty rights through the international instrument itself, as opposed to through domestic law. For such states, expulsion from the treaty regime would result in the indefinite suspension of these international rights.

Consequently, the Human Rights Committee has embraced an alternative which has already been exercised regionally by the European Court of Human Rights. Severance, whereby an invalid reservation is excised from the act of ratification, leaves the reserving state party to the treaty but without the benefit of the reservation. In the *Belilos* case<sup>368</sup> the European Court severed Switzerland’s reservation to Article 6(1) of the European Convention, holding that the reservation was of a general character as it was too vague to enable its exact meaning to be determined with certainty and was thus in violation of Article 64(1) of the European Convention.<sup>369</sup> This was despite the fact that the interpretative declaration (as Switzerland had called it) was presented as being a condition of ratification. The Court dismissed this argument, however, and asserted that the invalidity of the reservation would in no way impinge upon Switzerland’s continuing participation in the Convention as it firmly believed that “Switzerland is, and regards

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<sup>367</sup> Human Rights Committee. *General Comment No 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under article 41 of the Covenant*. UN Doc. CCPR/C/21/Rev.1/Add.6. 4 November 1994. § 18. See Korkelia, K. *Op. Cit.* Pg. 437 at 450.

<sup>368</sup> *Belilos v Switzerland*. Judgement of 29 April 1988. Application No. 10328/83. Series A, No. 132.

<sup>369</sup> This is now Article 57(1) following Protocol No. 11, and reads: “Any State may, when signing this Convention or when depositing its instrument of ratification, make a reservation in respect of any particular provision of the Convention to the extent that any law then in force in its territory is not in conformity with the provision. Reservations of a general character shall not be permitted under this article.” European Convention of Human Rights.

itself as, bound by the Convention irrespective of the validity of the declaration”.<sup>370</sup> Switzerland did not take kindly to this, and threatened to withdraw from the Convention completely as a result of the Court’s action.<sup>371</sup> The Court was later vindicated, however narrowly, when a proposal to withdraw from the Convention was debated and defeated in the Swiss Parliament.<sup>372</sup> This supports Redgewell’s argument that, more often than not, the desire to remain a member of the treaty will supersede the necessity of maintaining an invalid reservation.<sup>373</sup>

Following General Comment Number 24 some states, in particular the Nordic States, have embraced the notion of severance, asserting that the desired result of their objection to an impermissible reservation is that the reserving state will be considered to be a party to the treaty without the benefit of the reservation. Sweden is one such state which has adopted this stance in response to the reservation entered by Saudi Arabia to the Convention on the Elimination of Discrimination against Women. The reservation states that “in case of contradiction between any term of the Convention and the norms of Islamic law, the Kingdom is not under obligation to observe the contradictory terms of the convention”.<sup>374</sup> This reservation was widely objected to, and the Swedish Government stated not only that the objection would not preclude the entry into force of the treaty, but further it would enter into force in its entirety “without the Kingdom of Saudi Arabia benefiting from the said reservation”.<sup>375</sup>

Goodman believes that this act of severance is the ideal solution, not least of all for the reserving state. From the states perspective, it may very well be the case that it is in its own interests to remain party to the treaty, rather than endure the humiliation of being precluded from participation. To be officially reproached and prevented from

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<sup>370</sup> Belilos v Switzerland. Judgement of 29 April 1988. Application No. 10328/83. Series A, No. 132. § 66.

<sup>371</sup> Cameron, I and Horn, F. *Op. Cit.* Pg. 69 at 117; and Redgewell, C. *The Law of Reservations in respect of Multilateral Conventions*. Gardiner, J.P (ed). *Op. Cit.* Pg. 11.

<sup>372</sup> A motion to denounce the Convention taken in the Council of States was defeated by a single vote. Cameron, I and Horn, F. *Op. Cit.* Pg. 69 at 117.

<sup>373</sup> Redgewell, C. *The Law of Reservations in respect of Multilateral Conventions*. Gardiner, J.P (ed). *Op. Cit.* Pg. 11.

<sup>374</sup> Chapter IV.8. Status of Multilateral Treaties Deposited with the Secretary General. [online] URL: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty10.asp>. Accessed 21/07/2007.

<sup>375</sup> Chapter IV.8. Status of Multilateral Treaties Deposited with the Secretary General. [online] URL: <http://untreaty.un.org/ENGLISH/bible/englishinternetbible/partI/chapterIV/treaty10.asp>. Accessed 21/07/2007.

maintaining treaty membership on account of its stance towards a particular aspect or aspects of the treaty would be to publicly tarnish its international reputation. Would it not rather maintain its appearance as a human rights defender through continued membership of the treaty? Appearances, after all, are vital given the potential benefits to be derived from formal participation in the human rights regime. Treaty membership should not be sacrificed lightly. By severing the reservation in the first instance, rather than expelling the state from membership immediately, the state is free to reach its own reasoned decision on the most appropriate course of action: whether it wants to remain party to the treaty or remove itself entirely. If the state objects to being bound by the previously reserved provision(s) it is free to voluntarily withdraw from the treaty regime at that stage.<sup>376</sup> As was demonstrated by the Belilos case, it should not be presumed that severance of a reservation will automatically precipitate a withdrawal from the treaty: one should not underestimate the importance of treaty membership to a states own interests.

From the perspective of advancing human rights protection severance is far more preferential than expulsion. It ensures as many states as possible remain party to the treaty regime, and therefore subject to international scrutiny: as has been said before, better to have a state under the watchful eye of the United Nations than not, despite the struggle it then faces in converting its wants into actions.

Despite the seemingly logical arguments in favour of severance, both on the part of the individual state and the international community as a whole, that is not to say it has been welcomed with open arms by all concerned. While Nordic states have embraced the idea of nullifying the reservation rather than the ratification, this commendable stance has by no means been adopted by their counterparts. Quite the contrary: the attempt to shift international human rights law beyond the reservations regime applicable to public international law in general is viewed as an unacceptable assault on state consent, effectively aiming to usurp the sovereign will of states in acceding to international obligations. State consent informs the practice of expelling a state from the

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<sup>376</sup> Goodman, R. *Op. Cit.* Pg 531 at 538.

treaty regime if it has entered an impermissible reservation which forms an essential element of its consent to be bound by the treaty. It similarly challenges the potential of severing an invalid reservation: when a state voluntarily accedes to the treaty regime, it may do so under limits it itself has assigned through reservations.<sup>377</sup> Severance of a reservation by an external actor therefore blatantly opposes the principle of state consent as it results in the imposition of obligations upon a state in the absence of any prior agreement by that state to comply with such obligations. Consequently, it is not an option that the United States of America or the United Kingdom felt they could let pass. The United States replied to General Comment Number 24 condemning the possibility of severing an invalid reservation as “a legal fiction [which is] completely at odds with established legal practice and principles...”.<sup>378</sup> The United Kingdom stated that it was simply unfeasible to attempt to hold a state to account for obligations which it self-evidently has not accepted, but which, on the contrary, it has expressed its decided unwillingness to accept.<sup>379</sup>

Which will is most likely to prevail in practice? And what does this mean for the pursuit of universal human rights? One would like to believe that the position adopted by the United Nations human rights bodies and their Nordic allies would prevail. In terms of the importance of human rights to individuals the world over, such a robust approach designed to reduce the extremely detrimental consequences of impermissible reservations is both welcome and necessary. It sends a message to participating states that unacceptably broad reservations that fundamentally detract from the object and purpose of the treaty will not be tolerated. Yet one is inevitably disheartened by the reality of international human rights law. It is highly unlikely that this approach, heralded by both the treaty monitoring bodies and academics alike, will ever gain full effect in the face of opposition from the might of member states. No matter what the

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<sup>377</sup> Baratta, R. Should Invalid Reservations to Human Rights Treaties be Disregarded? *European Journal of International Law*. 2000. Vol. 11, No 2. Pg. 413 at 420.

<sup>378</sup> Report of the Human Rights Committee. *Annex VI: Observations by the United States of America on General Comment No. 24 (52), on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant*. UN Doc. A/50/40. Vol. I. 3 October 1995. § 5.

<sup>379</sup> Report of the Human Rights Committee. *Annex VI: Observations by the United Kingdom of Great Britain and Northern Ireland on General Comment No. 24 (52), on issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to Declarations under Article 41 of the Covenant*. UN Doc. A/50/40. Vol. I. 3 October 1995. § 14.

supervisory bodies say, member states are not likely to act on it, if they do not wish to. That is, even if a reservation is struck down as a legal nullity, will the state necessarily take note? Will it be forced to change its ways as a result? After close consideration, one must inevitably conclude not: as explained below, compliance with international human rights obligations is disappointingly poor, governed not necessarily by international legal obligation but by a myriad of other factors which influence state behaviour. Compliance, as we shall see, is perhaps the United Nations ultimate failing in transforming universal human rights from mere aspirational rhetoric to a positive practical fact.



## 6 A QUESTION OF COMPLIANCE

Poor compliance and weak international enforcement mechanisms deliver the final blow to the illusion of universal human rights. While the United Nations may preach the virtues of universal human rights, this means nothing if member states do not actively comply with their obligations. As Olara Otunnu notes, “the international community has done very well in elaborating norms, standards, and rules...But where we have not been effective is their application on the ground. Words on paper do not save a child in war”.<sup>380</sup> Addo also succinctly explains the importance of implementation, stating:

“The true value of the human rights strategy set out in the Charter of the United Nations lies in its effective implementation. In the absence of implementation, human rights remain little more than rhetorical promises. The point of implementation of human rights standards therefore marks a critical interface, between doctrine and reality, between rhetoric and action and between the priorities of national and international regimes. This is the stage at which the promises of human rights ideals mature into the reality of action and outcomes, and, therefore, the point of accountability”.<sup>381</sup>

Despite the impressive rhetoric of universalism, it falls short at the final and most important hurdle: the transformation from rhetoric to reality. As Kofi Annan highlighted in his 2005 *In Larger Freedom* report, words alone are not enough: “...without implementation, our declarations ring hollow. Without action, our promises are meaningless”.<sup>382</sup> If the United Nations human rights regime is to mean anything, member states must respect their treaty obligations.

Unfortunately, compliance by state parties with the norms they have ratified is

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<sup>380</sup> Otunnu, O. Special Representative of the Secretary-General for Children and Armed Conflict in Onishi, N. *The New York Times*. 09/05/00. Pg. A8 in Sills, J. *The Role of the United Nations in forming Global Norms. International Relations Studies and the United Nations Occasional Papers No. 2*. 2002. [online] URL: [http://www.acuns.wlu.ca/publications/Global\\_Norms/Sills.GlobalNorms.pdf](http://www.acuns.wlu.ca/publications/Global_Norms/Sills.GlobalNorms.pdf). Accessed 01/04/2005. Pg. 39.

<sup>381</sup> Addo, M. K. *Introduction*. In Addo, M. K (ed). *International Law of Human Rights*. Dartmouth Publishing. Aldershot. 2006. Pg. xxvii/iii.

<sup>382</sup> Report of the Secretary General. *In Larger Freedom: Towards Development, Security and Human Rights For All. Op. Cit.* § 130.

notoriously poor: while members are keen to accept the advantages of association and regularly partake in idealistic rhetoric, when it comes to actions many are regrettably lax. As Secretary General Ban Ki-moon summed up: “the Declaration remains as relevant today as it did on the day it was adopted. But the fundamental freedoms enshrined in it are still not a reality for everyone. Too often, Governments lack the political will to implement international norms they have willingly accepted”.<sup>383</sup> This chapter will therefore examine the complex issue of compliance, and its impact on the likelihood of realising universal human rights. Ultimately, it is submitted that compliance is a matter for national, as opposed to international, decision makers: while member states may re-affirm the virtues of universal human rights through the official arena of the United Nations, domestically they may flout these very same norms, free from any significant international influence. Compliance is not determined solely by the existence of binding obligations, but is a more complex political decision influenced by many different factors, which will be examined below. Thus it seems the United Nations is unable to ensure that states comply with their human rights obligations, and consequently cannot ensure their universal applicability.

## 6.1 The cost of universal ratification

As alluded to in the foregoing chapters, it is reasonable to conclude that compliance is not an automatic consequence of ratification: ratification does not equal compliance. As explained earlier in this thesis, in a bid to promote human rights throughout the international community, the United Nations has pushed for widespread ratification of its treaties. The United Nations thinking seems to be that state parties would find themselves “ensnared”<sup>384</sup> in an ever growing network of rights and obligations, which they would find difficult to evade. While the United Nations has garnered success in the push for universal ratification, with a large number of states now part of the international human rights treaty system, a presumption that this has had a substantial positive effect on international human rights protection seems naïve and optimistic. The act of ratification should not be taken as a definitive undertaking to comply with the

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<sup>383</sup> Secretary-General Ban Ki moon message on Human Rights Day, *Op. Cit.*

<sup>384</sup> International Law Association. *International Law Association Report on the Treaty System. Op. Cit.*

norms of the treaty. On the contrary, the suggestion that “for a great many states ratification has become an end in itself”<sup>385</sup> as far as their international obligations are concerned, would seem to be a more accurate assessment.

Professor Bayefsky is one commentator who has prominently criticised the United Nations approach to ratification, persuasively arguing that the cost of ratification has been compromised in the concerted effort to attract state parties. Ratification, it seems, has come at a price: “namely diminished obligations, lax supervision and few adverse consequences for non-compliance”.<sup>386</sup> While the widely ratified human rights treaties produced by the United Nations may be claimed as a universal reflection of global agreement on human rights, the reality is that global human rights practice falls somewhat short of these treaty norms. While it would be satisfying to conclude that ratification entailed a resolve by states to comply with the treaty provisions, for many states acceptance is no more than a “paper promise”<sup>387</sup>; a symbolic gesture which confirms their place in the international community but which is, in fact, “totally devoid of substance”.<sup>388</sup> Consequently, formal acceptance of treaty obligations does not necessarily equate to the furtherance of universal rights as ratification is not “synonymous with adherence to the procedures or substance of the treaty”.<sup>389</sup> This is readily illustrated by reference to state practice in Cambodia.

Cambodia has ratified six of the nine core human rights treaties, and is a signatory to a further two, yet violations of basic human rights are prevalent.<sup>390</sup> Recent widespread forced evictions, which according to Amnesty International “are fast becoming one of the most widespread and systematic human rights violations affecting Cambodians”<sup>391</sup>

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<sup>385</sup> Bayefsky, A.F. *The UN Human Rights Treaty System: Universality at the Crossroads*. *Op. Cit.* Pg. 7.

<sup>386</sup> International Law Association. *International Law Association Report on the Treaty System*. *Op. Cit.*

<sup>387</sup> Donoho, D.L [2001]. *Op. Cit.* Pg. 391 at 432.

<sup>388</sup> Pollis, A. *Towards a New Universalism: Reconstruction and Dialogue*. *Op. Cit.* Pg. 5 at 9.

<sup>389</sup> Bayefsky, A.F. *The UN Human Rights Treaty System: Universality at the Crossroads*. *Op. Cit.* Pg. 6.

<sup>390</sup> Cambodia has ratified the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, the International Covenant on the Elimination of Racial Discrimination, the Convention on the Elimination of Discrimination Against Women, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child. It is signatory to the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families and the Convention on the Rights of Persons with Disabilities.

<sup>391</sup> Amnesty International. *Rights Razed: Forced Evictions in Cambodia*. Pg. 4. AI Index:

are an example of the Cambodian authorities failure to realise their international human rights obligations. Having ratified the core human rights treaties, in particular the International Covenant on Economic Social and Cultural Rights which obliges members to take appropriate measures to ensure an adequate standard of living, which includes adequate housing,<sup>392</sup> and the International Covenant on Civil and Political Rights which prohibits arbitrary interference with a persons privacy and family, and guarantees everyone the protection of law against such interferences,<sup>393</sup> the Cambodian authorities are legally required to ensure that forced eviction is used only in “exceptional circumstances”<sup>394</sup> and as a last resort after exploring alternative solutions. Cambodia has further guaranteed the force of law to these international commitments through Article 31 of the Constitution of the Kingdom of Cambodia.<sup>395</sup> Despite this, Amnesty International concludes that “the Cambodian authorities are not only failing to protect – in law and in practice – its population against forced evictions, but are also actively involved in such acts, which contravene international law”.<sup>396</sup> Having conducted extensive research, including field visits and interviews with evictees, it is clear from Amnesty’s findings that the Cambodian authorities have failed to comply with their international treaty obligations. The evidence confirms they have also failed to follow the Basic Principles and Guidelines on Development Based Evictions and Displacement prepared by the Special Rapporteur on Adequate Housing, which were developed according to international standards to ensure that any evictions are lawful and carried

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ASA23/002/2008. [online] URL:

<http://www.amnesty.org/en/library/asset/ASA23/002/2008/en/b1328237-07c2-11dd-badf-1352a91852c5/asa230022008eng.pdf>. Accessed 13/08/2008.

<sup>392</sup> Article 11, International Covenant on Economic Social and Cultural Rights.

<sup>393</sup> Article 17, International Covenant on Civil and Political Rights.

<sup>394</sup> *In its General Comment on forced evictions, the CESCR has clarified that evictions can only be carried out when certain procedural protections are applied, including:* “(a) an opportunity for genuine consultation with those affected; (b) adequate and reasonable notice for all affected persons prior to the scheduled date of eviction; (c) information on the proposed evictions and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; (d) especially where groups of people are involved, government officials or their representatives to be present during an eviction; (e) all persons carrying out the eviction to be properly identified; (f) evictions not to take place in particularly bad weather or at night unless the affected persons consent; (g) provision of legal remedies; (h) provision, where possible, of legal aid to persons who are in need of it to seek redress from the courts.” General Comment No. 7. The Right to Adequate Housing: Forced Evictions. May 1997. UN Doc. E/1998/22, E/C.12/1997/10. Annex IV. Pg. 113/4.

<sup>395</sup> “The Kingdom of Cambodia shall recognize and respect human rights as stipulated in the United Nations Charter, the Universal Declaration of Human Rights, the covenants and conventions related to human rights, women’s and children’s rights.” Article 31. Constitution of the Kingdom of Cambodia. [online] URL: <http://www.cambodia.gov.kh/unisql1/egov/english/organ.constitution.html>. Accessed 08/12/2008.

<sup>396</sup> See Amnesty International. Rights Razed: Forced Evictions in Cambodia. *Op. Cit.* Pg. 43.

out in a manner consistent with human rights obligations.<sup>397</sup>

The forced eviction of villagers from Sambok Chap is one example which demonstrates the failures of the authorities on many levels: there was no communication with the villagers prior to the evictions nor any information provided on how they may challenge the eviction; threats and intimidation were widespread, as was destruction of personal property; there was a lack of basic infrastructure or services at the resettlement site, which lacked sanitation, electricity, water or health services; children who had previously attended school have been unable to continue their education; and many evictees have been unable to sustain their livelihood having been moved a great distance from the original settlement site.<sup>398</sup> The reason for the resettlement? Because the shelters of the settlement “pollute our city's beauty”,<sup>399</sup> according to Phnom Penh's municipal governor Kep Chuktema. Does this constitute an exceptional circumstance in which forced eviction may be legal? One would tend to doubt it. Violence, destruction of property and an overwhelming sense of helplessness, with villagers kept in the dark over virtually all aspects of the proposed evictions, from their legal rights to the reason underlying the decision to resettle, are characteristic of a spate of forced evictions throughout Cambodia since 2005.

Yet this is only one example from one member state of a failure to comply with their assumed human rights obligations. Many more occur daily. Amnesty International's annual human rights report confirms that the 1948 promises are not yet a 2008 reality. In fact, far from it: the pledges made in the Universal Declaration are violated with depressing regularity.<sup>400</sup> Hathaway, following an extensive investigation into treaty membership, concludes that forty percent of the countries in which torture is reported to be widely practiced have, in fact, ratified the Convention against Torture, while the Special Rapporteur on Slavery confirms that “slavery is not history...today more than

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<sup>397</sup> Kothari, M. Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living. Annex I: Basic Principles and Guidelines on Development-Based Evictions and Displacement. UN Doc. A/HRC/4/18. 05/07/2007.

<sup>398</sup> See Amnesty International. *Rights Razed: Forced Evictions in Cambodia*. *Op. Cit.* pp. 25-29.

<sup>399</sup> The Cambodia Daily. *Tonle Bassac Villagers to be evicted next week*. 5 June 2006. as quoted in Amnesty International. *Rights Razed: Forced Evictions in Cambodia*. *Op. Cit.* Pg. 26.

<sup>400</sup> Amnesty International. *Amnesty International Report 2008: State of the World's Human Rights. Facts and Figures*. 2008. [online] URL: <http://thereport.amnesty.org/eng/facts-and-figures>. Accessed 13/12/2008.

27 million men, women, boys and girls who live their every day in slavery or slavery-like conditions".<sup>401</sup> Thus, Hathaway concludes that "it remains the case that large numbers of countries with the worst human rights practices are members of treaty regimes that prohibit the practices in which they engage".<sup>402</sup> It is evident, therefore, that despite the fact that ratification signifies the moment at which a state "establishes on the international plane its consent to be bound by a treaty",<sup>403</sup> it does not necessarily represent some sort of magic moment whereby the state suddenly mends its ways and abides absolutely with its commitments. According to Henkin, therefore, adoption of any or all of the treaties does not necessarily entail "a resolve by member nations to change or mend their ways".<sup>404</sup> This is a most depressing realisation: the outlook for universal human rights is bleak to say the least. In order to understand such flagrant disregard for international human rights law, one must consider two interrelated issues. First, one must establish why states sign up to human rights treaties in the first place. Second, one must ask why, regardless of the states intentions in signing up to the treaty, they are then able to blatantly disregard their assumed obligations. From the answers to these enquiries, it becomes obvious that human rights are far from becoming the universally respected and applied standards the United Nations aspires to.

## 6.2 The Ratification Motivation: Realist, not Idealist

The question of why states sign up to human rights treaties is complicated by the age old nemesis of human rights: state sovereignty. Sovereignty, as was discussed earlier in this thesis, is hugely important to and fiercely protected by states. Why then would they submit to an international treaty? On the face of it, ratification imposes a significant burden on the ratifying state, compromising the states sovereignty by inviting external intrusion in internal affairs. When a state ratifies a treaty, it "assume[s] obligations and duties under international law to respect, to protect and to fulfill human rights...[and]

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<sup>401</sup> United Nations Press Release. "*Slavery is not history*", warns UN Special Rapporteur. 27 November 2008. [online] URL: <http://www.unhchr.ch/huricane/hurricane.nsf/view01/FE8192C24CB4BA77C125750E004DB973?opendocument>. Accessed 08/12/2008.

<sup>402</sup> Hathaway, O.A [2003(a)]. Testing Conventional Wisdom. *European Journal of International Law*. 2003. Vol. 14, No. 1. pp. 185-199 at Pg. 189.

<sup>403</sup> Article 2(1)(b). Vienna Convention on the Law of Treaties 1969.

<sup>404</sup> Henkin, L [1965]. *Op. Cit.* Pg. 504 at 508.

Governments undertake to put into place domestic measures and legislation compatible with their treaty obligations and duties”.<sup>405</sup> Clearly, given the ramifications of treaty membership, ratification is not a step which should be taken lightly. A ratifying state is giving explicit consent to the international community to inspect its relationship with its citizens, and hold it accountable to external human rights standards.<sup>406</sup> This, as has already been established, goes against all settled norms of international behaviour. Moreover, the rationale behind ratification becomes ever more puzzling when one considers the lack of reciprocity which characterises human rights treaties. A state will not gain any formal reciprocal benefit by joining a human rights treaty: the United Kingdom, for example, gains little tangible benefit from Columbia promising its citizens the right to enjoy the benefits of trade unions membership, free from undue interference.<sup>407</sup> If a state receives no reciprocal benefit by ratifying a treaty, what is their motivation for doing so?

When one poses the question of why states sign up to an international human rights treaty, the obvious answer would be that they do so because they agree with the treaty's principles. As ratification is voluntary, it would seem logical that a state would only bind itself by something with which it agrees. Moreover, *pacta sunt servanda* – “every treaty in force is binding upon the parties to it and must be performed by them in good faith”<sup>408</sup> – would seem to dictate that the ratifying state fully intended to honor its assumed legally binding obligations. Thus the idealist normative view of ratification would indicate a genuine commitment to human rights is the sole motivating force underlying the decision to ratify.<sup>409</sup> Under this view, only those states that seriously intended to fulfill their human rights obligations would even consider ratifying the treaties: states that had little or no intention of abiding by these standards would not even contemplate it. Yet this is not necessarily the case, and such superficial reasoning ignores a rather more complicated relationship between ratification and compliance. It

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<sup>405</sup> Office of the United Nations High Commissioner for Human Rights. *International Human Rights Law*. [online] URL: <http://www.ohchr.org/EN/ProfessionalInterest/Pages/InternationalLaw.aspx>. Accessed 09/08/2008.

<sup>406</sup> Hathaway, O.A [2003(b)]. The Cost of Commitment. *Stanford Law Review*. 2003. Vol. 55. Pg. 101 at 107.

<sup>407</sup> Article 8. International Covenant on Economic Social and Cultural Rights. See Hathaway, O.A [2003(b)]. *Op. Cit.* Pg. 103, and Neumayer, E. Do Human Rights Treaties Improve Respect for Human Rights? Pg. 3.

<sup>408</sup> Article 26, Vienna Convention on the Law of Treaties 1969.

<sup>409</sup> Hathaway, O.A [2003(b)]. *Op. Cit.* Pg. 107.

does not explain why states with poor human rights records sign up to treaties, while other states with markedly better human rights records may fail to do so.<sup>410</sup> Nor does it recognise that, despite the binding character of international human rights treaties, ratification does not necessarily entail compliance: the fact that the treaty is legally binding does not, in itself, ensure that states comply with its terms. Ultimately, the issue of compliance is far more complicated than a simple question of being legally bound by a treaty.

If ratification is capable of imposing such a significant burden on the ratifying state, and the decision to ratify is not based solely on an idealist commitment to advancing human rights, what motivates a state to sign up? As noted in the earlier part of this thesis, states which have ratified human rights treaties may nevertheless question the legitimacy of their principles on grounds of cultural insensitivity, and thus one wonders why they would sign up in the first place. The answer lies in the realisation that ratification is not only capable of imposing a burden on the state, but also has the capacity to confer correlative benefits. Ultimately, the state must make an assessment of the relative costs and benefits associated with ratification. That is, while there is a potentially significant cost to the state, the issue arises of whether the benefits the state would derive from ratification would outweigh these costs.<sup>411</sup> Once such a calculation is undertaken, it becomes clear that ratification is less likely to signify an idealist commitment to human rights than it is to be motivated by political self interest. Ratification is no more than a political tool employed in an attempt to secure a strong and respected stance in the international community, which is crucial to a state's own interests<sup>412</sup>: a state will be wary of openly dissenting from international consensus on human rights standards, as to do so may cost it its place in international diplomacy.<sup>413</sup> Political expediency requires states to associate themselves with favourable human rights standards, quite irrespective of their actual or intended human rights practices, and ratification provides "surface evidence of commitment to the norms embedded in the treaties [which can be used to]

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<sup>410</sup> *Ibid.* Pg. 102.

<sup>411</sup> Hathaway, O.A [2003(b)]. *Op. Cit.* Pg. 107.

<sup>412</sup> See Nickel, J and Reidy, D. *Relativism, Self Determination and Human Rights*. In Chatterjee, D. and Krausz, M. (eds.) *Globalization, Development and Democracy: Philosophical Perspectives*. [online] URL: <http://web.utk.edu/~dreidy/pdf&filename=nickelreidyfinaldraft2005.pdf>. Accessed 02/07/2007.

<sup>413</sup> Tyagi, Y.K [2003(b)]. *Op. Cit.*



placate more genuinely interested parties to which they must answer”.<sup>414</sup> Hathaway, following an extensive investigation into ratification and compliance with human rights treaties, argues that states are effectively rewarded for their position, rather than their practice: in other words, a state may derive benefits from its appearance as a nation committed to human rights standards, without necessarily improving its human rights standards.<sup>415</sup> When considered in this light, a decision to ratify seems the obvious choice: it makes sense that a state would seek to secure a most favourable position for itself in international relations, and in this respect, being able to hold itself up as having committed to important international human rights standards is likely to prove a crucial tool. After all, surely a state that has formally adopted such a treaty will be viewed more positively than a state that has openly questioned and rejected those same norms.

And with this realisation, the mystery behind the unfulfilled rhetoric of universal human rights unravels further: as ratification is not solely determined by a genuine commitment to a treaty's principles, but is instead perhaps no more than a disingenuous act of a self-interested state, the fact that the United Nations has so far failed to live up to its universal pledges comes as no surprise. Ultimately, as Bayefsky accurately contends, ratification has become “a means to easy accolades for empty gestures”,<sup>416</sup> which accords with Hathaway’s conclusion that there is “not a single treaty for which ratification seems to be reliably associated with better human rights practices...”.<sup>417</sup> Such a conclusion deals a severe blow to the aspirations of the United Nations human rights regime. If this statement is accurate, then the supposed universality of human rights is nothing more than a misnomer. Clearly, if there is such a compliance deficit, the rhetoric of universal human rights remains but a forlorn aspiration, far from becoming a practical reality despite promising ratification statistics.

So why, then, does such a compliance deficit exist? What leads Hathaway to conclude that there is no reliable correlation between ratification and compliance? Why are states

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<sup>414</sup> Hathaway, O.A [2002]. Do Human Rights Treaties Make a Difference? The Yale Law Journal. Vol. 111. 2002. Pg. 1935 at 2008/9; Hathaway, O.A [2003(a)]. *Op. Cit.* Pg 185 at Pg. 196.

<sup>415</sup> Hathaway, O.A [2003(b)]. *Op. Cit.* Pg.101 at 119.

<sup>416</sup> International Law Association. *International Law Association Report on the Treaty System.* *Op. Cit.*

<sup>417</sup> Hathaway, O.A [2002]. *Op. Cit.* Pg. 1935 at 1940.

able to benefit from ratification without having to undergo any corresponding improvement in human rights practice? This inevitably stems from the very nature of international human rights law, and the extent to which the United Nations as an international organisation, can be expected to ensure compliance. By considering the primary tools at the disposal of the United Nations – in particular the treaty monitoring bodies and the procedures of the recently created Human Rights Council – it is evident that the ability of an international body to perform this task is limited at best. With the creation of the Human Rights Council there is hope for the future, but much lies in the hands of member states: if they fail to take their responsibilities seriously, there will be little progress despite the new machinery. The decision on whether to comply with international human rights obligations is a national concern, and thus the ability to ensure human rights norms are universally respected is somewhat outwith the grasp of the United Nations. As will be argued below, compliance is determined not by the United Nations, but by a range of factors which ultimately affect a states own interests. Thus, the United Nations is apparently doomed to fall at the final, and most important, hurdle in the path from universal ideals to practical outcomes.

Due to the nature of international law, and the omnipresent importance of state sovereignty, the supervisory organs of the United Nations have been deliberately created by member states with a subsidiary, non judicial character. While states may voluntarily sign up to the treaty system, they nevertheless remain reticent about the prospect of having their domestic affairs subjected to international investigation: the ability of an external body to pronounce judgement on matters traditionally within a states domestic jurisdiction does not sit favourably. Thus, while states may have voluntarily accepted the creation of a system of treaty monitoring through independent experts, it has been solely on their pre-determined terms: in practice, states have handed over little authority to these supra-national organs.

The United Nations therefore plays a subsidiary, non judicial, role in the implementation of human rights nationally. First and foremost, responsibility for implementing and enforcing human rights lies with the national institutions of each member state. While this arrangement is a pragmatic solution to the interplay between

sovereignty of states and human rights, it is also hoped that conferring prime responsibility on individual members will encourage the internalisation of treaty norms, such that they become ingrained into the fabric of society. Koh argues it is this process of integration which will ultimately improve the likelihood of the state complying with its international obligations in the longterm.<sup>418</sup> Thus, while member states remain ultimately responsible, faithful implementation of human rights obligations is not always forthcoming. To complement the national implementation of norms, the United Nations organs therefore participate in the promotion of human rights by supervising states and monitoring their levels of compliance, through two principle mechanisms: the treaty monitoring bodies and the Charter based Human Rights Council.

### 6.3 Treaty Monitoring Bodies

Let us first consider the United Nations primary mechanism for monitoring human rights compliance: the treaty monitoring bodies. From this consideration, it will become apparent that this system is not only ill equipped but totally unable to ensure the realisation of universal rights. As the name suggests, each of the United Nations core human rights treaties has a corresponding body of independent experts entrusted with monitoring the implementation of their respective treaties throughout member states.<sup>419</sup> Unfortunately, however, the capacity of the monitoring bodies to hold states to account to their assumed human rights norms simply does not exist.

As subsidiary institutions, the treaty monitoring bodies are designed to assist states in complying with their international obligations, rather than acting as an “intrusive enforcement body”<sup>420</sup> with the power to issue binding decisions. While the subsidiarity of international supervision is an inescapable consequence of national sovereignty, its effectiveness as a mechanism by which states can be coerced into compliance depends,

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<sup>418</sup> Koh, H.H [1996/7]. *Op. Cit.* Pg. 2599 at 2603.

<sup>419</sup> Office of the United Nations High Commissioner for Human Rights. Human Rights Bodies. [online] URL: <http://www.ohchr.org/EN/HRBodies/Pages/HumanRightsBodies.aspx>. Accessed 09/12/2008. The International Convention for the Protection of All Persons from Enforced Disappearance is not yet in force and thus the corresponding monitoring body is not yet in existence.

<sup>420</sup> Mutua, M. Looking Past the Human Rights Committee: An Argument for De-Marginalizing Enforcement. *Buffalo Human Rights Law Review*. 1998. Vol. 4. Pg. 211 at 232.

paradoxically, on the very states under review. That is, the goodwill of national governments, or lack of it, fundamentally determines whether human rights ideals progress to practical outcomes; whether human rights transform from rhetoric to reality. The United Nations supervisory bodies primarily carry out their function through a system of state reporting and individual communications. As we shall see from the examination which follows, however, neither of these can be relied on as an effective means of ensuring the realisation of treaty rights.

The state reporting system was designed to act as an aid to both member states and monitoring bodies alike. The Committee which oversees the International Covenant on Economic, Social and Cultural Rights stated in its General Comment Number 1 that “the reporting obligations which are contained in...the Covenant are designed principally to assist each state party in fulfilling its obligations under the Covenant...”.<sup>421</sup> Periodic reporting is considered to be a vital mechanism in encouraging states to comply with their international obligations by allowing them to take stock of what has been achieved and assess what yet remains to be done: “recognition of rights on paper is not sufficient to guarantee that they will be enjoyed in practice”<sup>422</sup> and the treaty monitoring system, in theory, has a key role to play in transforming the universal ideals codified in the treaties into a reality. As explained by the Committee on Economic, Social and Cultural Rights, treaty monitoring should facilitate the advancement of human rights standards by developing a states understanding of its obligations, highlighting the progress made as well as the challenges and shortcomings faced in the implementation of these standards, and bringing these matters to bear in the public arena.<sup>423</sup> In practice, however, it is fraught with problems. The extent to which it may be deemed effective is therefore debateable.

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<sup>421</sup> Committee on Economic, Social and Cultural Rights. *General Comment 1: Reporting by State Parties*. 24 February 1989. [online] URL: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/38e23a6ddd6c0f4dc12563ed0051cde7?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/38e23a6ddd6c0f4dc12563ed0051cde7?Opendocument). Accessed 20/07/2007.

<sup>422</sup> Office of the United Nations High Commissioner for Human Rights. *Human Rights Treaty Bodies: Monitoring the Core International Human Rights Treaties*. [online] URL: <http://www2.ohchr.org/english/bodies/treaty/index.htm>. Accessed 09/12/2008.

<sup>423</sup> Committee on Economic, Social and Cultural Rights. *General Comment 1: Reporting by State Parties*. 24 February 1989. [online] URL: [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/38e23a6ddd6c0f4dc12563ed0051cde7?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/38e23a6ddd6c0f4dc12563ed0051cde7?Opendocument). Accessed 20/07/2007.

The first problem with state reporting lies in the fact that committees are empowered only to consider the information contained in the report presented by the state. The report is intended to be a candid self evaluation of “the legal, administrative and judicial measures taken by the state to give effect to the treaty provisions [as well as] any factors or difficulties that have been encountered in implementing the rights”.<sup>424</sup> In reality, however, it is more likely to be utilised as an opportunity for shameless self-promotion: it is a rare state indeed that will critically assess its own practices when it has the chance to promote a more favourable picture instead. The content of state reports therefore impedes the ability of the monitoring committees to undertake their task in overseeing human rights compliance, as they do not have the capacity to probe behind the official account prepared by the state. A state report simply cannot be taken as an accurate depiction of its actual human rights practice. Myanmar’s state report to the Committee on the Rights of the Child, for example, has the audacity to claim that “there are no children involved in armed conflict”,<sup>425</sup> when it is well known that this is far from accurate. The true situation is quite the opposite, with more than twenty five percent of the three hundred thousand suspected child soldiers participating in armed conflict around the globe forcibly conscripted to both national and non-state armies.<sup>426</sup> For the Myanmar authorities to claim otherwise demonstrates an irreverent disregard for their reporting obligations.

Secondly, the submission of a report – regardless of its content – is by no means guaranteed. In fact, a huge number of states regularly fail to fulfil their reporting obligations, which is even more disappointing. Liberia, for example, was due to submit

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<sup>424</sup> Office of the United Nations High Commissioner for Human Rights. *The United Nations Human Rights Treaty System: An introduction to the core human rights treaties and the treaty bodies. Fact Sheet Number 30*. [online] URL: <http://www.ohchr.org/english/bodies/docs/OHCHR-FactSheet30.pdf>. Accessed 26/07/2007. Pg. 26.

<sup>425</sup> Committee on the Rights of the Child. Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Second periodic reports of States parties due in 1998: Myanmar. UN Doc. CRC/C/70/Add.21. 5 November 2003. § 217.

<sup>426</sup> Human Rights Watch. *Child Soldier Use 2003: A Briefing for the 4th UN Security Council Open Debate on Children and Armed Conflict*. 2003. [online] URL: <http://www.hrw.org/reports/2004/childsoldiers0104/childsoldiers.pdf>. Accessed 10/10/2008; Human Rights Watch. *Sold to be Soldiers: The Recruitment and Use of Child Soldiers in Burma*. October 2007. [online] URL: <http://hrw.org/reports/2007/burma1007/burma1007web.pdf>. Accessed 10/10/2008; Becker, J.A. A Gun As Tall As Me: Child Soldiers in Burma. Commentary. *The Asian Wall Street Journal*. [online] URL: <http://hrw.org/english/docs/2004/01/20/burma6966.htm>. Accessed 30/09/2004.

its initial report on the International Convention on the Elimination of Racial Discrimination in 1977, but even now has so far failed to submit any of the sixteen reports required since the Convention entered force in the country in 1976.<sup>427</sup> It is therefore thirty years in arrears, and the Committee is yet to consider a single report. When one undertakes an assessment of the cost involved in reporting compared to the consequences of failing to, it is clear that reporting is simply not deemed to be a priority for states, and thus the entire system is characterised by delinquency: at the start of 2005 just shy of fifteen hundred reports were overdue, with six hundred and forty eight of them overdue for more than five years, and thus “the average state party to a treaty with reporting requirements has more than eleven reports overdue to the treaty bodies”.<sup>428</sup>

The reporting burden on states is great: if a state has ratified all of the core human rights treaties – as the United Nations so vociferously urges – it is potentially expected to produce as many as twenty seven reports over a ten year period: this is clearly an enormous undertaking. Of course, production of the report is not the end; on the contrary, it is very often only the beginning of a long and arduous process. The state may also be asked to produce responses to a list of issues raised by the committee; to attend the treaty body session; and to submit a further report on the measures taken to follow up the concluding observations of the committee, for each treaty it has ratified. In addition, other (non-core) human rights treaties such as the European Social Charter also require states to submit regular reports.<sup>429</sup> The burden on states is therefore substantial.

The paradox to this is that there are very few cost consequences associated with a failure to report. For many states, reporting is simply not viewed as a priority because the cost to consequence ratio simply does not warrant it. There is effectively nothing a treaty

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<sup>427</sup> Liberia: Reporting History. [online] URL: [http://www.bayefsky.com/pdf/liberia\\_t3\\_cerd.pdf](http://www.bayefsky.com/pdf/liberia_t3_cerd.pdf). Accessed 09/12/2008.

<sup>428</sup> Monitoring implementation of the international human rights instruments: an overview of the current treaty body system. *Paper presented at the Fifth Session of the Ad Hoc Committee on a Comprehensive and Integral International Convention on Protection and Promotion of the Rights and Dignity of Persons with Disabilities*. 4 February 2005. § 24. [online] URL: [www.ihr.org/\\_fileupload/banners/10HCHRpaperbyMaraBustelo.doc](http://www.ihr.org/_fileupload/banners/10HCHRpaperbyMaraBustelo.doc). Accessed 19/12/2008.

<sup>429</sup> Article 21. European Social Charter. Treaty open for signature by the member States of the Council of Europe. Entry into force 26/2/1965 in accordance with Article 35(2).

monitoring body can do to compel a state to report, and there are no means of censuring a delinquent state for failing to.<sup>430</sup> They have no power to impose sanctions on a defaulting state, for example. At worst, they may threaten to consider the state in abstentia, in an attempt to provoke it into a response.<sup>431</sup> They can do no more.

This lead the Independent Expert to note with concern that “large scale non-reporting makes a mockery of the reporting system as a whole. It leads to a situation in which many States are effectively rewarded for violating their obligations while others are penalised for complying...”.<sup>432</sup> Those states which are willing to comply with their international human rights obligations by permitting a supranational body to closely scrutinise their human rights practices are essentially being punished when the treaty bodies find fault. On the other hand, some of the most repressive regimes which flagrantly abuse human rights and ignore their reporting obligations escape comment. This has inevitably resulted in a situation “in which a diminishing number of States will report very regularly and others will almost never do so”<sup>433</sup>: the incentive pull for complying with arduous reporting obligations is weakening all the while.

If a state does submit a report, how is this information utilised in the furtherance of human rights? Ultimately, the consideration of the report results in the Committee issuing its Concluding Observations on the human rights practice of the state concerned. These concluding observations outline the concerns and recommendations of the Committee in response to the state report, and are intended to act as a basis for the enhanced implementation of treaty rights in the future. However, given the non-judicial nature of the United Nations organs, the concluding observations of the Committee do not constitute a binding determination with which the state can be compelled to comply. Rather, as the Committees attempt to monitor implementation

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<sup>430</sup> Crawford, J. *The United Nations Human Rights Treaty System: A System in Crisis?* Pg. 4. In Alston, P and Crawford, J (eds.). *The Future of UN Human Rights Treaty Monitoring*. Cambridge University Press. Cambridge. 2000.

<sup>431</sup> Human Rights Committee. *General Comment No. 30: Reporting Obligations of States parties under article 40 of the Covenant*. UN Doc. CCPR/C/21/Rev.2/Add.12. 18 September 2002.

<sup>432</sup> Alston, P. Effective Functioning of Bodies Established Pursuant to United Nations Human Rights Instruments. *Final Report on Enhancing the Long Term Effectiveness of the United Nations Human Rights Treaty System*. *Op. Cit.* § 44.

<sup>433</sup> *Ibid.* § 44.

via a system of state reporting, they adopt the language of diplomacy. This “constructive dialogue”, reflective of the bodies non-judicial nature, assists the treaties bodies in their fundamental aim of working with member states and avoids the process deteriorating into a hostile, confrontation stand-off. Unfortunately, the upshot is that the concluding observations are more reminiscent of a feeble and desperate plea to the state rather than an authoritative assessment. Treaty bodies are able to “encourage”<sup>434</sup> or even “urge”<sup>435</sup> a state to comply with its obligations, but should it fail to do so, the most severe reprimand the delinquent state is likely to face is an expression of the “deep regret”<sup>436</sup> or “concern”<sup>437</sup> of the treaty body.

The Committee on the Rights of the Child for example, when considering the human rights record of Myanmar, concluded simply that it was “extremely concerned”<sup>438</sup> about the widespread use of child soldiers by both Government and other forces, despite the fact that the forced conscription of child soldiers has been an ongoing problem in the country and one which obviously has devastating consequences for the children concerned. The Committee on the Elimination of Discrimination Against Women, meanwhile, “recommend[ed]” that Malian authorities increase efforts “to eliminate the practice of female genital mutilation”.<sup>439</sup> Female genital mutilation, as was discussed in chapter three, is one of the most severe and brutal violations of women’s rights: a

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<sup>434</sup> “The Committee encourages the State party to continue monitoring all tendencies which may give rise to racist or xenophobic behaviour and to combat the negative consequences of such tendencies.” Committee on the Elimination of Racial Discrimination. *Consideration of Reports Submitted by States Parties under Article 9 of the Convention. Concluding Observations: The Netherlands: European Part Of The Kingdom*. UN Doc. CERD/C/64/CO/7. 10 May 2004. § 10.

<sup>435</sup> “The Committee urges the State party to review the use of restraints and solitary confinement in custody, education, health and welfare institutions...”. Committee on the Rights of the Child. *Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: United Kingdom of Great Britain and Northern Ireland*. UN Doc. CRC/C/15/Add.188. 9 October 2002. § 34

<sup>436</sup> “In light of its previous recommendation..., the Committee deeply regrets that the State party persists in retaining the defence of “reasonable chastisement” and has taken no significant action towards prohibiting all corporal punishment of children in the family.” Committee on the Rights of the Child. *Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: United Kingdom of Great Britain and Northern Ireland*. Op. Cit. § 36.

<sup>437</sup> “The Committee is concerned about the occurrence in the State party of racist and xenophobic incidents, particularly of an anti-Semitic and “Islamophobic” nature, and of manifestations of discriminatory attitudes towards ethnic minorities.” Committee on the Elimination of Racial Discrimination. *Consideration of Reports Submitted by States Parties under Article 9 of the Convention. Concluding Observations: The Netherlands: European Part Of The Kingdom*. UN Doc. CERD/C/64/CO/7. 10 May 2004. § 10.

<sup>438</sup> Committee on the Rights of the Child. *Consideration of Reports Submitted by States Parties under Article 44 of the Convention. Concluding Observations: Myanmar*. UN Doc. CRC/C/15/Add.237. 30 June 2004. § 66.

<sup>439</sup> Committee on the Elimination of Discrimination against Women. *Concluding comments of the Committee on the Elimination of Discrimination against Women: Mali*. UN Doc. CEDAW/C/MLI/CO/5. 3 February 2006. §24.



“recommendation” to a state which even the Committee notes demonstrates a “reluctance to expedite the adoption of legislation aimed at eradicating this violation of women’s rights”<sup>440</sup> hardly seems sufficient. Moreover, as Kofi Annan made clear in his In Larger Freedom report, the state reporting process is “weakened... by poor implementation of recommendations”.<sup>441</sup> The fact is that governments have “not found it particularly painful”<sup>442</sup> to simply ignore, without consequence from the United Nations, the observations made by the monitoring bodies. This leads Donoho to conclude that it would be “somewhat of a misnomer” to consider the work of the treaty bodies as a means of enforcement at all: it is merely a mechanism for moral suasion that cannot be relied upon to compel delinquent states into honouring their obligations.<sup>443</sup> The state reporting system is certainly not, of itself, a plausible means of converting the theory of universal human rights into practice given that it is not capable of ensuring compliance with treaty norms.

So what of the effectiveness of the individual communications procedure? Surely enabling an individual to bring an alleged violation of his or her human rights to the attention of the monitoring committee is an effective means of supervising human rights compliance? Potentially, yes. But the ability of an individual to raise a communication is by no means automatic, which in itself hinders its usefulness as a means of ensuring the realisation of human rights throughout the international community. States must formally opt in by making a declaration recognising the competence of the committee in this regard. The number of states that have done so, however, is disappointing: for all but one<sup>444</sup> of the treaties with an associated complaint procedure, the take up by states party to the treaty is less than half. The decision to commit to the individual communication procedure is of course not one to be made lightly, not least of all because it essentially seeks to create a “double standard of

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<sup>440</sup> *Ibid.* §23.

<sup>441</sup> Report of the Secretary General. *In Larger Freedom: Towards Development, Security and Human Rights For All*. *Op. Cit.* § 147.

<sup>442</sup> Donoho, D.L. [2006]. *Op. Cit.* Pg. 1 at 22.

<sup>443</sup> *Ibid.* 1 at 18.

<sup>444</sup> The Optional Protocol to the International Covenant on Civil and Political Rights has secured the participation of one hundred and eleven states.

adherence”<sup>445</sup> to treaty rights, subjecting member states to a greater degree of supra-national scrutiny than non-members. However, as with concluding observations, the views formulated by the Committees are non-binding and there is no enforcement procedure. Thus, yet again, the implementation of the committees views relies on the goodwill of member states: it is those who stand accused of perpetrating their violation that are ultimately responsible for remedying the wrongdoing.<sup>446</sup>

Despite the non binding nature of treaty body output, the work of the treaty bodies has become increasingly sophisticated since their creation, and through their output they have made a “significant contribution”<sup>447</sup> to the promotion and protection of human rights over the years. An International Law Association study conducted to document the extent to which the work of the treaty bodies had begun to have an impact on the work of national courts and tribunals found that Governments accept that “the views, concluding observations and comments, and general comments and recommendations of the treaty bodies are to be accorded considerable importance as the pronouncement of a body expert in the issues covered by the treaty...”<sup>448</sup> and, in general, courts have noted that the findings of the treaty bodies can be relevant and useful in assisting national courts or tribunals in their tasks.<sup>449</sup> For example, the Federal Court of Australia has previously stated that “although the views of the [Human Rights] Committee lack precedential authority in an Australian court, it is legitimate to have regard to them as the opinions of an expert body established by the treaty to further its objects...”<sup>450</sup>

However, states have been keen to discredit the status of views. While national courts have demonstrated that they are generally willing to accept that the opinion of such expert bodies should be afforded a certain weight, state sovereignty dictates that they

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<sup>445</sup> Helfer, L.R and Slaughter, A-M. *Op. Cit.* Pg. 273 at 342.

<sup>446</sup> Donoho, D.L [2001]. *Op. Cit.* Pg. 1 at 22/23.

<sup>447</sup> Report of the Secretariat. *Concept Paper on the High Commissioner’s Proposal for a Unified Standing Treaty Body*. UN Doc. HRI/MC/2006/2. 22 March 2006. § 11.

<sup>448</sup> International Law Association. *Committee on International Human Rights Law and Practice: Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*. 2004. [online] URL: [http://www.ila-hq.org/html/layout\\_committee.htm](http://www.ila-hq.org/html/layout_committee.htm). Accessed 20/07/2007. § 16.

<sup>449</sup> *Ibid.* § 8.

<sup>450</sup> Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri [2003] FCAFC 70. § 148. For an overview of a considerable number of national cases in which Committee output has been referred to see International Law Association. *Committee on International Human Rights Law and Practice: Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*. 2004. *Op. Cit.*

consistently refuse to accept they are formally obliged to follow Committee output as binding interpretations of the treaty. Indeed, Indeed, Fennelly J, delivering judgement of the Supreme Court of Ireland, concluded that “[t]he notion that the "views" of a Committee even of admittedly distinguished experts on international human rights, though not necessarily lawyers, could prevail against the concluded decision of a properly constituted court is patently unacceptable”.<sup>451</sup>

Unsurprisingly, therefore, compliance with Committee views is often wholly unsatisfactory, demonstrated by the failure of the Spanish Constitutional Court to give effect to an adverse finding by the Human Rights Committee in *Gómez Vázquez v Spain*,<sup>452</sup> when it was held that the Spanish Criminal Procedure Act violated Article 14(5) of the International Covenant on Civil and Political Rights.<sup>453</sup> The Report of the Human Rights Committee produced in 2006 states that in four hundred and twenty nine views out of the five hundred and forty seven adopted since 1979, they have concluded that there has been a violation of the Covenant.<sup>454</sup> However, information requested by the Committee to show what the state has done to comply with the views in which a violation had been found indicates that less than ten percent have resulted in a satisfactory outcome,<sup>455</sup> satisfactory being classed as those cases whereby the state concerned “display[s] the willingness... to implement the Committee’s recommendations or to offer the complainant an appropriate remedy”.<sup>456</sup> The individual communications system therefore falls somewhat short of its intended objectives, and contributes to the continued failure to secure universal human rights.

## 6.4 The Human Rights Council

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<sup>451</sup> *Kavanagh v Governor of Mountjoy Prison* [2002] IESC 13. § 36.

<sup>452</sup> Human Rights Committee. *Communication No. 701/1996: Spain*. UN Doc. CCPR/C/69/D/701/1996. 11 August 2000. See International Law Association, *Committee on International Human Rights Law and Practice: Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*. 2004. *Op. Cit.* § 35-37 for further information on this dispute.

<sup>453</sup> Article 14(5) states that “Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law”. International Covenant on Civil and Political Rights.

<sup>454</sup> Report of the Human Rights Committee [2006]. Vol. I. UN Doc. A/61/40 (Vol. I). 1 December 2006. § 228.

<sup>455</sup> *Ibid.* PP. 108-129.

<sup>456</sup> *Ibid.* § 229.

Perhaps the most promising measure taken to improve the effectiveness of human rights treaties is the recent creation of the Human Rights Council, which is responsible for promoting and protecting human rights and fundamental freedoms without distinction; addressing situations of human rights violations; and promoting the effective coordination and mainstreaming of human rights throughout the UN system.<sup>457</sup> The Human Rights Council replaced the discredited Commission on Human Rights, which had been “increasingly undermined by its declining credibility and professionalism [given that] States... sought membership of the Commission not to strengthen human rights but to protect themselves against criticism or to criticize others. As a result, a credibility deficit... developed, which cast[.] a shadow on the reputation of the United Nations system as a whole”.<sup>458</sup>

The international community should be applauded for the assertiveness it showed in creating the Human Rights Council, which indicated a renewed push to increase the prominence of human rights in international relations by affording them the same status as the United Nations two other foundational pillars; development and security.<sup>459</sup> Indeed, its creation was accompanied by great optimism for the future; a renewed belief in the imperative obligation to advance human rights standards throughout the world, with members undertaking to “uphold the highest standards in the promotion and protection of human rights”.<sup>460</sup> In performing its role as guardian of human rights, the Council has three main mechanisms: it has assumed the special procedures of the Commission; holds regular sessions which allow it to deal with actual and emerging human rights situations; and undertakes a new universal periodic review mechanism.

Much optimism surrounds the potential of universal periodic review in holding states to account over their human rights obligations, which Human Rights Watch claims “presents a historic opportunity for strengthening the promotion and protection of

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<sup>457</sup> General Assembly Resolution 60/251: Human Rights Council. UN Doc A/RES/60/251. 3 April 2006.

<sup>458</sup> Report of the Secretary General. In *Larger Freedom: Towards Development, Security and Human Rights For All*. *Op. Cit.* § 182.

<sup>459</sup> *Ibid.* § 183.

<sup>460</sup> General Assembly Resolution 60/251: Human Rights Council. *Op. Cit.* § 9.

human rights”.<sup>461</sup> Certainly, the success or failure of the universal periodic review mechanism will be critical in determining whether the Human Rights Council makes a positive contribution to the promotion and protection of human rights throughout the international community. Universal periodic review is an evaluation, based on objective and reliable information “of the fulfillment by each state of its human rights obligations and commitments in a manner which ensures universality of coverage and equal treatment with respect to all states”.<sup>462</sup> Thus, all United Nations member states will be subject to scrutiny by the Human Rights Council. This addresses a key criticism of the Commission, which was that members would use their position on the Commission as a means of shielding themselves from scrutiny. There will be no such possibility under the new system created by the Council: no state will be beyond the eye of the Council, and members will be reviewed during their term of membership. Thus, Secretary General Ban Ki-moon has said that the universal periodic review mechanism “has great potential to promote and protect human rights in the darkest corners of the world”.<sup>463</sup>

The extent to which the Council engages with interested stakeholders such as national NGO's and human rights institutions is perhaps the most important factor in determining the success of universal periodic review as a means of promoting respect for universal human rights. The inevitable weakness with the system is that, necessarily, implementation lies in the hands of the state subject to review: just as with the treaty monitoring bodies and the Commission before it, the Council has no means of sanctioning a state which fails to act on the recommendations of its review. What is to stop a state blithely shrugging aside the review outcome without further thought? Quite simply, it is the activism of national bodies dedicated to promoting human rights which is likely to prove most instrumental in this respect. The Human Rights Council must work closely with relevant parties to ensure that the actual human rights situation of the country is improved following review: an outcome document will mean little in

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<sup>461</sup> Human Rights Watch. *The Universal Periodic Review Mechanism: Joint Statement to the First Session of the Human Rights Council*. 27 June 2006. [online] URL: <http://www.hrw.org/en/news/2006/06/27/universal-periodic-review-mechanism>. Accessed 16/12/2008.

<sup>462</sup> General Assembly Resolution 60/251: Human Rights Council. *Op. Cit.* § 5(e)

<sup>463</sup> Ki-moon, B. *Universal Periodic Review*. [online] URL: <http://www.ohchr.org/EN/HRBodies/UPR/Pages/UPRmain.aspx>. Accessed 15/12/2008.

isolation, if it is not supported by action.<sup>464</sup>

Universal period review therefore has the potential to further the progression of universal human rights from words to actions. The challenge is to ensure this potential is realised. In addition to universal periodic review the Human Rights Council has assumed the special procedures of the Commission, which enables the Council to address both thematic and country specific human rights issues as and when required.<sup>465</sup> The ability of special procedures to raise awareness of important human rights issues throughout the world has the potential to be a vital tool in driving the wheels of change.<sup>466</sup> Indeed, an NGO joint statement argues that

“special procedures are at the core of the [United Nations] human rights machinery. They are among the most innovative, responsive and flexible tools of the human rights machinery, and they play a critical and often unique role in protecting and promoting human rights. Without independent and objective experts who are able to monitor and respond rapidly to allegations of violations occurring anywhere in the world, the ability of the [United Nations] – in particular the Human Rights Council - to respond to violations will be severely compromised”.<sup>467</sup>

Yet these procedures, too, have failed to quite live up to their potential, and require revision and rationalisation in order that they “evolv[e.] into a truly systematic and professional system from responding to, and seeking to pre-empt or prevent, major human rights violation around the world”.<sup>468</sup> The process of revision is ongoing, yet surely one of the most important factors to address is the effect of the independent experts report on the protection of human rights at national level. As the United

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<sup>464</sup> The Century Foundation. The Human Rights Council One Year On: Are We Any Better Off? The Century Foundation, Open Society Institute and Friedrich Ebert Foundation Roundtable Discussion. 19 June 2007. [online] URL: <http://www.tcf.org/list.asp?type=EV&pubid=188>. Accessed 16/12/2008.

<sup>465</sup> Office of the United Nations High Commissioner for Human Rights. *Special Procedures of the Human Rights Council*. [online] URL: <http://www2.ohchr.org/english/bodies/chr/special/index.htm>. Accessed 16/12/2008.

<sup>466</sup> Office of the United Nations High Commissioner for Human Rights. Factsheet 27 (under revision). Pg. 12. [online] URL: <http://www.ohchr.org/Documents/Publications/FactSheet27en.pdf>. Accessed 19/12/2008.

<sup>467</sup> Joint Statement. *UN Human Rights Council: Criteria for a successful outcome of the Review of Special Procedures*. [online] URL: <http://www.fidh.org/IMG/pdf/NGOjointsubnovSP.pdf>. Accessed 16/12/2008.

<sup>468</sup> Alston, P [2006]. Reconceiving the UN Human Rights Regime: Challenges Confronting the New UN Human Rights Council. *Melbourne Journal of International Law*. 2006. Vol. 7. Pg. 185 at 214.

Nations itself admits, the special procedures mechanism is far from conclusive in improving human rights protection, given that action in response to a missions findings depends on a variety of factors: the attitude of national governments, the reaction of the international community to the national situation, and the activism of civil society in pursuing the cause.<sup>469</sup> Alston confirms that, too often in the past, Governments have viewed country visits as “the governmental equivalent of an unpleasant dental appointment which, once endured, can comfortably be forgotten”.<sup>470</sup> This is not helped by the fact that the international community has not always best utilized the work of its rapporteurs. The possibility of violent ethnic erupting in Rwanda, for example, was highlighted by the special rapporteur on extrajudicial, summary or arbitrary executions prior to the genocide, but the international community failed to act on this early warning, with devastating consequences.<sup>471</sup> The important work of special rapporteurs must be brought to bear at the conclusion of their mission, but one doubts whether the international community will have more success under the auspices of the Human Rights Council than under the discredited Commission. The consideration of why states comply with international human rights obligations reveals that the task of ensuring this is an inherently difficult one for an international organisation such as the United Nations to achieve.

As with any international endeavour, the ability of the Human Rights Council to promote compliance with universal human rights ultimately lies in the hands of states themselves; their attitude towards assumed human rights commitments and their acceptance of the work of the Human Rights Council. While it would appear to be more aptly equipped than the treaty monitoring bodies in ensuring compliance, we must not forget that neither the treaty monitoring bodies nor the discredited Commission on Human Rights were designed to fail: it was member states that failed the Commission – and are failing the treaty monitoring bodies – by manipulating it to serve their own interests rather than furthering its proper purpose of defending human rights. The

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<sup>469</sup> Office of the United Nations High Commissioner for Human Rights. Factsheet 27 (under revision). *Op. Cit.* Pg. 12.

<sup>470</sup> Alston, P [2006]. *Op. Cit.* Pg. 185 at 221.

<sup>471</sup> Office of the United Nations High Commissioner for Human Rights. Factsheet 27 (under revision). *Op. Cit.* Pg. 13.

success or failure of the Human Rights Council in promoting respect for universal human rights through its universal periodic review mechanism and its special procedures ultimately lies in the extent to which these tools are utilised to effectively pressure and influence national governments. As discussed below, compliance with international human rights is intricately linked with a states domestic and international concerns, not simply legal obligation. Thus, if these procedures are utilised effectively such that the state faces both domestic and international pressure to improve its human rights practices and comply with assumed obligations, the likelihood of achieving universal human rights shines far more brightly than at any time before.

## 6.5 Why Comply? The Question of Compliance

The question of compliance with international human rights obligations is a very complex one. It would be wrong to presume that a state will never comply with a legally non binding view, just as it would be naive to suppose that legally binding obligations will always be obeyed. If the gap between rhetoric and reality in international human rights is ever to been understood, let alone overcome, the inquiry into compliance is a vital one. When Louis Henkin claimed that "almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time"<sup>472</sup> back in 1979, he was probably correct.<sup>473</sup> But the fact is, in international human rights law in particular, many nations do not comply with many of their obligations much of the time. So why do some nations observe their international commitments while others disregard them? What motivates a state to respect, or conversely, violate promises made? It is the answer to this inquiry which is likely to uncover the most significant challenge faced by the United Nations in the quest to secure universal human rights.

"The duties which [international law] imposes", Austin wrote, "are enforced by moral sanctions: by fear on the part of nations...of provoking general hostility, and incurring

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<sup>472</sup> Henkin, L 1979]. *How Nations Behave: Law and Foreign Policy*. Columbia University Press. New York. 2<sup>nd</sup> Edition. 1979. Pg. 47.

<sup>473</sup> Koh, H.H [1996/7]. *Op. Cit.* Pg. 2599 at 2599.



its probable evils, in case they shall violate maxims generally received and respected".<sup>474</sup> This, though surmised almost two hundred years ago, still holds credence today: compliance with international law is largely dictated by concern over reputation. Thus, while undertaking a cost consequence calculation a state must have regard to the bigger picture, the fact that international human rights norms have become "nested within a much broader fabric of ongoing communal relations"<sup>475</sup> such that a states actions with respect to human rights will have a continued effect on its wider interests. Thus, labeled the Cynics Formula, it is argued that human rights obligations will only be complied with by those "nation states acting out of transparent convenience or self interest".<sup>476</sup> According to Louis Henkin, state sovereignty hinders the enforcement of international law as a state will only honour international obligations and, in the case of human rights submit to and comply with monitoring obligations, if to do so is in its own interests,<sup>477</sup> such that acceptance of a treaty is by no means synonymous with adherence to its standards.

However, to simply conclude that international human rights law is absolutely determined by national self-interest would be incorrect: if states were purely acting out of their own concerns, irrespective of the bigger picture, the international human rights "regime" would be nothing more than an anarchic shambles.<sup>478</sup> The fact is, the necessity of an international regime is indispensable: members recognise that a degree of co-ordination and co-operation is required in order to facilitate international stability. Thus, those states which respect their international human rights obligations may be inclined to do so, perhaps even if to do so is inconvenient, because "they have a longer-term interest in the maintenance of law-impregnated international community".<sup>479</sup>

Yet a large part of the compliance question is nevertheless dominated by state interests

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<sup>474</sup> Austin, J. *The Province Of Jurisprudence Determined*. 1832. Quoted in Koh, H.H [1996/7]. *Op. Cit.* Pg. 2599 at 2609.

<sup>475</sup> *Ibid.* Pg. 2599 at 2617.

<sup>476</sup> Koh, H.H [1999]. *How Is International Human Rights Law Enforced?* *Indiana Law Journal*. 1999. Vol. 74. Pg. 1397 at 1398.

<sup>477</sup> Henkin, L [1995(b)]. *Op. Cit.* Pg. 31 at 32.

<sup>478</sup> Hathaway, O.A [2002]. *Op. Cit.* Pg. 1935 at 1950.

<sup>479</sup> Hurrell, A. *International Society and the Study of Regimes: A Reflective Approach*. Quoted in Koh, H.H [1996/7]. *Op. Cit.* Pg. 2599 at 2634.

and reputation. As discussed at the outset of this chapter, the decision on whether to ratify an international human rights treaty is often heavily influenced by the cost involved in doing so: primarily, the likelihood of being forced to comply with their assumed obligations. In terms of human rights one must conclude that, in this sense, the costs are low: international institutions are ill-equipped to compel compliance, and the imposition of international sanctions for a violative human rights practice is unlikely in the extreme.<sup>480</sup> The costs are therefore overwhelmingly reputational: how important is it that the state is seen by its peers as a human rights defender rather than an egregious violator? Hathaway believes that states may choose to comply in order to “obtain or maintain a reputation for compliance and hence good international citizenship”.<sup>481</sup>

Given that human rights are able to significantly shape a states international, and domestic, reputation, Henkin believes "that nations act deliberately and rationally, after mustering carefully and weighing precisely all the relevant facts and factors [and] barring an infrequent non-rational act, nations will observe international obligations unless violation promises an important balance of advantage over cost".<sup>482</sup> These factors are both internal and external. That is, the determination of what is in a states best interests will be fundamentally influenced by the domestic situation: the level of democratic, representative government, commitment to the rule of law, the strength of non-governmental organisations and such like.<sup>483</sup> One must therefore understand the domestic situation before attempting to interpret a states international behaviour<sup>484</sup>: domestic politics fundamentally inform a states actions on the world stage, and ultimately influences the level of compliance with legally binding but often easily ignored human rights obligations.

The costs of membership are therefore likely to be felt more strongly by liberal, democratic Governments, as in such a state, the people are the de facto sovereign

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<sup>480</sup> Chayes, A and Handler Chayes, A. *The New Sovereignty: Compliance with International Regulatory Agreements*. Harvard University Press. Cambridge. 1995. Pg. 2/3.

<sup>481</sup> Hathaway, O.A [2002]. *Op. Cit.* Pg. 1935 at 1952.

<sup>482</sup> Henkin, L [1979]. *Op. Cit.* Pg. 47.

<sup>483</sup> Koh, H.H [1996/7]. *Op. Cit.* Pg. 2599 at 2633.

<sup>484</sup> Hathaway, O.A [2002]. *Op. Cit.* Pg. 1935 at 1952/3.

power.<sup>485</sup> Representing the will of the people, the Government is bound to be more responsive to its international obligations: the democratic state is structured so as to translate domestic interests into state actions, and the act of ratifying an international treaty triggers the mobilisation of domestic pressure groups which aim to coerce the Government into honouring its obligations.<sup>486</sup> There is therefore a transformative power of human rights obligations when applied to a democratic Government: human rights obligations are undeniably persuasive ideals – which is why no nation is likely to reject the promises of the Universal Declaration – and thus when reinforced by strong activism they do have the power to transform and improve the practices of member states.<sup>487</sup> Unfortunately, however, in the absence of democracy or the rule of law, states may nonchalantly disregard their promises, safe in the knowledge that neither their people nor their peers have the power – or the will – to oppose them.

Herein lies universalism's insurmountable hurdle: compliance with international human rights, while legally binding, is never likely to be susceptible to effective international policing, and truly universal norms which match the utopian rhetoric are thus forever beyond the grasp of the United Nations. It is, inescapably, a domestic rather than international matter. There are clearly many factors which influence the decision on whether to comply with human rights obligations, but these presently come to bear outwith the orbit of the United Nations system. Thus it is here, in shaping domestic decision making, that the procedures of the recently created Human Rights Council could ultimately prove most beneficial in transforming legal obligations into tangible, universal outcomes. If the Human Rights Council is able to get under the skin of member states by effectively engaging with civil society, there must be hope for the future.<sup>488</sup> Thus it is imperative the Council retains its credibility and avoids falling foul of the fate that befell its predecessor: if politics are sidelined in the name of genuine commitment to the goal of advancing human rights universally, the United Nations should slowly edge towards its utopian pledges. We must hope members grasp this

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<sup>485</sup> Helfer, L.R and Slaughter, A-M. *Op. Cit.* Pg. 273 at 331-335.

<sup>486</sup> Hathaway, O.A [2002]. *Op. Cit.* Pg. 1935 at 1954.

<sup>487</sup> *Ibid.* Pg. 1935 at 1957.

<sup>488</sup> Shelton, D. International Human Rights Law: Principled, Double, or Absent Standards? *Law and Inequality*. 2007. Vol. 25, No. 2. Pg. 467 at 472.

opportunity to take a stand in defence of human rights. It is too early to guess whether this is likely: one can only hope so.

What does all this mean in practice? There is no escaping the fact that compliance with human rights obligations is, in the end, unacceptably dependent on the goodwill of individual member states. As Hathaway notes, “the major engines of compliance that exist in other areas of international law are for the most part absent in the area of human rights”<sup>489</sup> and thus the noble aspirations of the United Nations are fatally undermined by the paradox of enforcement: the United Nations is powerless to compel compliance, and thus the furtherance of human rights relies on the goodwill of those accused of their violation, as they are the only ones with the power to remedy their wrongdoing. The United Nations treaty bodies cannot compel a state to comply with its findings, and consequently the furtherance of human rights hinges on the goodwill of the respondent state. Of course, in very limited circumstances the Security Council may intervene if the situation constitutes a threat to international peace and security, but this is by no means a satisfactory solution. Given the extremely limited composition of the Security Council, it lacks objectivity and is inevitably motivated by politics rather than human rights. Consequently, it cannot be relied upon as an appropriate vessel to enforce human rights obligations, and nor should it be expected to undertake this task: a politically influenced body, let us not be duped into believing that its members will always have protection of human rights at the forefront of their agenda. And so it is that the most fundamental of the United Nations goals totally lacks effective international enforcement, and the universality of human rights hangs in the balance, with member states alone capable of tipping the scales in their favour. Unfortunately, this is an idealist system which cannot be relied upon in a less than ideal world; it has been proven an unrealistic aspiration in a world where goodwill of Governments is often sadly lacking.

So what is the upshot? Violations occur with monotonous regularity and thus, the United Nations human rights regime has never quite lived up to its promises. Day after day, rights are violated with monotonous regularity throughout the international

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<sup>489</sup> Hathaway, O.A [2002]. *Op. Cit.* Pg. 1935 at 1938.

community: from Guantanamo Bay, to Somalia, Zimbabwe, Cambodia and Columbia, to name but a few. On the anniversary of sixty long years since the Universal Declarations creation, Secretary General Ban Ki-moon solemnly reminded nations that, while “we have come a long way [we must] acknowledge the savage inhumanity that too many people in our world must endure”.<sup>490</sup> This is a depressing but ultimately accurate realisation: while international human rights are heralded as the universal entitlements of the world’s citizens, the truth is that these supposedly inalienable and inviolable rights remain but a forlorn aspiration for millions of the world’s most impoverished. Yes, the rhetoric of universal human rights is persuasive and defensible: of course all people from all nations should be equally entitled and protected by the panoply of rights and obligations enshrined in the international human rights treaties. To claim otherwise would be to deny the fundamental equality of the human species. But this idealist vision remains unfulfilled. The sad fact is that universal human rights are not – yet – a reality.

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<sup>490</sup> Ki-moon, B. *Human Rights Council marks UDHR 60*. December 2008. [online] URL: <http://www.ohchr.org/EN/NewsEvents/Pages/HumanRightsCouncilMarksUDHR60.aspx>. Accessed 15/12/2008.

## 7 THE RHETORIC BUT NOT THE REALITY OF UNIVERSAL HUMAN RIGHTS: CONCLUDING COMMENTS

The depressing conclusion one must inevitably draw from the foregoing consideration of universal human rights is that, in practice, the rhetoric simply does not depict the reality. This thesis has demonstrated that the United Nations is fluent in the rather empty rhetoric of universalism: as yet, however, it has failed to successfully transform this rhetoric into a practical reality. In fact, it seems that over the course of the six decades since the passing of the Universal Declaration, its aspirational pledges have fallen by the wayside, abused by Governments that “have shown more interest in the abuse of power or in the pursuit of political self-interest, than in respecting the rights of those they lead”.<sup>491</sup> As the United Nations High Commissioner for Human Rights has admitted, “although basic human rights principles enjoy universal agreement, the gap between rhetoric and reality is wide indeed”.<sup>492</sup> One cannot ignore the persistent human rights violations which continue to blight the lives of millions around the globe, and which attest to the fact that, as yet, the United Nations remains some way short of satisfactorily achieving its goals. While the rhetoric is a proclamation of inalienable, inviolable entitlements, the reality is very often one of broken, unfulfilled promises.

The founders of the United Nations showed commendable foresight and unity when they produced the landmark Declaration in 1948, committed to promoting “universal respect for and observance of human rights and fundamental freedoms”.<sup>493</sup> Despite the competing ideologies of the Cold War, the United Nations innovatively premised its extensive human rights regime on the universal applicability of the provisions it enshrined: the core human rights treaties seek to protect rights which should be universally enjoyed by individuals throughout the world without distinction, and which bind every nation party to them. As was argued in chapter two, the universality of rights is a sound platform on which to build the regime. Indeed, it is an inescapable pre-

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<sup>491</sup> Amnesty International. Amnesty International Report 2008: State of the World's Human Rights. 2008. *Op. Cit.* Pg. 3.

<sup>492</sup> Office of the United Nations High Commissioner for Human Rights. *The OHCHR Plan of Action: Protection and Empowerment*. May 2005. [online] URL: <http://www.ohchr.org/english/planaction.pdf>. Accessed 31/07/2007. § 6.

<sup>493</sup> Preamble § 6. Universal Declaration of Human Rights.

requisite: the conferral of rights without distinction is essential given that they derive from the dignity inherent in the human person. As dignity attaches to all members of the human family, so too must human rights. If our world is to advance in any way, we must ensure human dignity is respected absolutely, of this there is no question: in order to protect dignity, one must protect human rights. It is through the protection of human rights that the value of the human person is allowed to flourish. Without doubt, human rights must be a universal enterprise.

The United Nations, over the course of the six decades since the creation of the Universal Declaration in 1948, has been unrelenting in its bid to promote human rights. It has been equally insistent on the universality of these norms, taking advantages of the prominence of key events such as the 2005 World Summit to confirm that “the universal nature [of human rights] is beyond question”.<sup>494</sup> Yet worlds alone fail to ensure actions; and promises count for little if their content is not realised. Commendable and defensible as it may be, one must ultimately recognise that the United Nations utopian rhetoric of universal rights is not fully supported by the reality of international human rights law. On the contrary; although the United Nations has managed to produce a number of treaties which confirm our entitlements, this is not to say that it has ensured they mean anything in practice. While the core human rights treaties have garnered widespread ratification this does not, in itself, prove the practical universality of their terms. In reality, when one probes behind the veneer of universalism painted by the United Nations, it is evident that the likelihood of securing truly universal human rights is severely challenged by several competing forces: cultural relativism, state sovereignty, reservations and poor compliance combine to fatally undermine the United Nations universal rhetoric.

Ideologically, universalism has long been challenged by the competing claims of cultural relativism; a school of thought in complete opposition to the ideology of universal human rights, which asserts that there can be no overarching values which apply cross culturally. This is a debate which has long raged, and one which shows no sign of

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<sup>494</sup> 2005 World Summit Outcome. § 119-121.

abating. That the United Nations has so far failed to demonstrate how the commonality of universal norms can be reconciled with the diversity of a multi-cultural community has merely served to perpetuate and exacerbate the tension, such that the legitimate concerns of cultural relativists are ripe for abuse by those seeking to evade their human rights obligations.

Relativists assert that the United Nations human rights regime is inherently biased towards Western values and beliefs, and is thus inapplicable to non-Western cultures. Yet upon closer analysis, it appears that this argument, relied upon to reject the universality of norms, is substantively unfounded: we must dismiss the contention that universal rights are purely Western values which have been imposed upon the international community at large as superficial and misguided. The United Nations was not and is not a purely Western organisation representing only Western values: a diverse membership proclaimed the Universal Declaration in 1948, and one would question which of these rights are applicable only to Western states; one wonders which rights non-Western cultures can really do without?

Nonetheless, the voice of discontent over the cultural applicability of universal norms has not quieted, and this is testament to the fact that the genuine concerns of cultural relativists do, in fact, have a legitimate grounding. While one cannot accept the mala fides manipulation of this relativist contention, the United Nations must nevertheless demonstrate flexibility in the interpretation of universal rights, such that they are accepted as norms which are applicable and relevant cross culturally. Chapter three therefore suggested that the skillful adoption of the European margin of appreciation doctrine could serve to successfully interweave cultural particularity with the demands of universal rights. It is unacceptable to arrogantly assert that rights are universal and expect the subservience of competing ideologies: yes, rights are universal – they must be universal – but they must also be applicable to all peoples and all nations. The margin of appreciation doctrine was developed by the European Court out of a desire to protect the legitimate diversity of its members while still ensuring respect for fundamental values. If the United Nations is able to achieve this, recourse to the language of cultural relativism is less likely to serve as an excuse for those seeking to evade their human



rights obligations. The conflict between universalism and cultural relativism is not, one argues, insurmountable; but if it is not satisfactorily addressed, the advancement of human rights will inevitably continue to suffer.

This, however, is only the first of a number of problems faced by the United Nations in its bid to secure universal human rights: while cultural relativism challenges the theory of universalism, state sovereignty severely impairs the practical realisation and protection of universal human rights norms. State sovereignty, as discussed in chapter four, seriously undermines the United Nations in its quest to transform human rights from empty promises to universal entitlements. In international relations, state sovereignty has traditionally been a prevailing force. It is a fundamental principle of international law which dictates that the state has sole jurisdiction for the treatment of individuals within its territorial boundaries. International human rights law, by proclaiming rights for individuals and conferring legally binding obligations on the state, appears to be in clear conflict with the “cornerstone”<sup>495</sup> of international law. By prescribing rights which must be implemented and protected for individuals within a states jurisdiction, international human rights law purports to penetrate the previously impermeable barrier of state sovereignty. A perpetuating conflict has therefore characterised the United Nations endeavours to secure universal rights: state sovereignty versus supra national obligations. While it is widely argued in academia that sovereignty has been eroded by the demands of universal human rights, this does not seem to be the case in practice.

While sovereignty does not appear to have significantly hindered the widespread ratification of treaties, this cannot be taken as irrefutable evidence of the supremacy of human rights over sovereignty. Although in theory ratification diminishes a state’s sovereignty, in practice this is not necessarily the case. The tragedies perpetrated by the Khmer Rouge, the Rwandan genocide and the continuing crisis suffered by Darfur all demonstrate the challenges the international community faces in protecting human rights in the face of state sovereignty. When egregiously violated by sovereign states, the

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<sup>495</sup> Annan, K.A. Quoted in Miller, J. *Op. Cit.*

international community faces a tough task indeed in ensuring the universal promises of human rights are realised by those who need their protection most.

Moreover, by continually asserting the need for universal ratification, the United Nations may have unwittingly undermined the very universality it is attempting to promote. As examined in chapter five, reservations are an inescapable component of the international human rights landscape, yet they have a destructive effect on the universality of human rights. States are essentially able to cherry pick what rights they are bound by and consequently rights are reduced to privileges afforded by the state rather than universal entitlements of all individuals: the rights one enjoys therefore becomes dependant on where one has the fortune (or misfortune) of living. In many cases, the very act of ratification is all but nullified given the scope of the reservations which accompany it, and given that international human rights treaties exist for the welfare of their citizens rather than the benefit of states, one may question whether reservations to human rights treaties should be permitted at all. Reservations are, indeed, a detrimental force in the quest to secure meaningful, universal standards which are protected and respected by all member states. The supposed universality of human rights treaty provisions has been almost irreparably damaged by the prominence of reservations: while the unreserved treaty may represent a codification of the universal entitlements of all persons, when subject to extensive reservations the realisation of these norms throughout the international community is fatally compromised. While reservations exist, human rights will never be truly universal.

Having signed up to the international treaty system, subject to reservations or otherwise, the United Nations assumes responsibility for monitoring the implementation of human rights within each state. Chapter six argued that this is perhaps the toughest challenge the United Nations faces in its efforts to secure universal protection of human rights. The nature of the international system, premised on state sovereignty, dictates that any international supervision of human rights is subsidiary to national measures. Responsibility for implementing human rights therefore lies, first and foremost, with each member state. The primary monitoring mechanisms available to the United Nations are simply unable to compel compliance with assumed obligations.

International human rights law is therefore characterised by the paradox of implementation: the ideology of universal human rights cannot be ensured when left in the hands of national governments, yet the international community is unable to enforce implementation.

The United Nations relies on the goodwill of its members to faithfully implement its human rights promises. This, however, cannot be taken for granted. The requisite inclination to comply with international human rights obligations is often sadly lacking, and the United Nations faces the depressing paradox that the remedy for rectifying human rights abuses is left solely in the hands of those who stand accused of their violation. If the United Nations finds that a member state is failing to respect human rights, in reality there is very little it is able to do to force the state to comply with its obligations. Despite the binding nature of international human rights treaties, it should not be presumed that ratification will be undertaken only by those states genuinely committed to the treaty norms. In fact, given that the realised costs associated with treaty ratification are often nominal, ratification may be motivated by a states desire to portray itself as a human rights defender: a state party to a human rights treaty is effectively rewarded by its position rather than its practice given that compliance cannot be effectively determined by the United Nations supervisory organs. Rather, the issue of compliance with international human rights obligations is a complex matter determined by a myriad of forces ultimately outwith the influence of the United Nations. Ultimately, domestic influences, rather than international pressure or legal obligation, are likely to determine compliance with human rights norms. And herein lies the United Nations most significant hurdle in securing universal human rights: when compliance is dictated by the wants and desires of national governments rather than an imperative obligation to advance the promises of international treaties, human rights will never be truly universal.

Universal human rights are essential: there is a need for a common standard to unite nations, and give all individuals hope, a benchmark for that to which they are entitled and that which they need not suffer. Yes, the concept of universal rights is a valid one. The United Nations relentless push to emphasis the universality of rights is a defensible

exercise. Human rights, as such, are and must be universal. World leaders should be commended for the vision and foresight they demonstrated in 1948, yet in 2008 it is evident that they have “fail[ed] to deliver on the promise of justice and equality”<sup>496</sup> pledged in the Universal Declaration. Universal human rights are a commendable venture, but one cannot simply ignore the fact that, as yet, they remain far from being universally enjoyed and protected. One must wonder what the future holds for the success of the United Nations human rights regime: despite sixty years of trying, the aspirational promises of the Universal Declaration are not yet a reality. One can only hope that, one day, the reality matches the rhetoric: “we the peoples”<sup>497</sup> deserve no less.

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<sup>496</sup> Amnesty International. Amnesty International Report 2008: State of the World's Human Rights. 2008. *Op. Cit.* Pg. 3.

<sup>497</sup> Preamble. Charter of the United Nations.

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